

Nos. **10-5284, 10-5297, 10-5345** (consolidated)  
ORAL ARGUMENT NOT YET SCHEDULED

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SIERRA CLUB; CLEAN WATER ACTION; GULF RESTORATION  
NETWORK; CHRIS LOY; RICHARD SOMMERVILLE

*Plaintiffs-Appellees-Cross-Appellants*

*v.*

MERDITH W.B. TEMPLE, Major General, Acting Chief of Engineers, United States  
Army Corps of Engineers; KENNETH LEE SALAZAR, Secretary,  
United States Department of the Interior; ROWAN W. GOULD, Acting Director,  
United States Fish and Wildlife Service

*Defendants-Appellants-Cross-Appellees*

SIERRA PROPERTIES, LLC, *et al.*

*Intervenor-Defendants-Appellants-Cross-Appellees*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Hon. Royce C. Lamberth, Judge

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**FINAL OPENING BRIEF OF THE FEDERAL APPELLANTS**

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## CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

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United States Army Corps of Engineers  
Kenneth Lee Salazar, Secretary, Department of the Interior  
Sam Hilton, Director (former), United States Fish & Wildlife Service  
Rowan W. Gould, Acting Director, United States Fish & Wildlife Service  
Sierra Properties, LLC  
Pasco 54, Ltd.  
Pasco Ranch, Inc.  
JG Cypress Creek, LLC

### **RULINGS UNDER REVIEW:**

Memorandum Opinion, *Sierra Club v. van Antwerp*, 1:07-cv-01756 (D.D.C. June 30, 2010) (Hon. Royce Lamberth)

Judgment, *Sierra Club v. van Antwerp*, 1:07-cv-01756 (D.D.C. June 30, 2010) (Hon. Royce Lamberth)

Memorandum Opinion and Order, *Sierra Club v. van Antwerp*, 1:07-cv-01756 (D.D.C. August 20, 2010) (Hon. Royce Lamberth)

### **RELATED CASES:**

The case on review has not previously been before this Court or any other court. The Federal Appellants are unaware of any related cases within the meaning of D.C. Cir. R. 28(a)(1)(C), with the exception of the consolidated cases listed in the caption of this brief.

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## STATEMENT OF JURISDICTION

Plaintiffs Sierra Club, *et al.*, filed suit against the United States Army Corps of Engineers (“Corps”) and the Fish and Wildlife Service (“Service”) in the United States District Court for the District of Columbia, challenging a permit issued by the Corps pursuant to Section 404 of the Clean Water Act (“CWA”), 33 U.S.C. § 1344. The district court had jurisdiction under 28 U.S.C. § 1331. The district court issued a final order on August 20, 2010. The Corps filed a timely notice of appeal on October 15, 2010. Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

In 2007, the Corps issued a permit to Intervenor-Defendant Sierra Properties, LLC (“Permittee”), authorizing the discharge of dredged or fill material into waters of the United States in connection with the construction of the Cypress Creek Town Center Project (“Project”), a regional shopping mall development near Tampa, Florida. The Sierra Club alleged that, in issuing the permit, the Corps violated the CWA, the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, and the Endangered Species Act (“ESA”), 16 U.S.C. § 1532. The permit was suspended in 2008, and in 2009 the Corps reissued the permit with modifications. *See* JA 1855-1969. The issues presented on appeal are:

1. Whether the Corps was arbitrary or capricious in determining that the Project,

including mitigation, was not a “significant” Federal action for purposes of NEPA requiring the preparation of an Environmental Impact Statement (“EIS”).

2. Whether the Corps was arbitrary or capricious in concluding, pursuant to the CWA Section 404(b)(1) Guidelines, that no alternative to the proposed project with less adverse environmental effects was “practicable.”

## **STATUTES AND REGULATIONS**

Pertinent statutes and regulations are reproduced in the attached Addendum.

## **STATEMENT OF THE FACTS**

### **I. The Cypress Creek Town Center Project**

Construction began in 2007 on the Project which, when completed, will be a large regional shopping mall development including hotel, banking, restaurant, cinema, office, and multi-family housing uses. *See* JA 1074. The Project site is located in Pasco County, Florida, along Interstate 75 and bisected by State Road 56 (a four-lane highway). *See, e.g.*, JA 1073. The Project site consists of just over 502 acres of land, JA 1073, 1675, 155.46 acres of which are jurisdictional wetlands and 9.65 acres of which are jurisdictional surface waters. *Id.* Cypress Creek, a regulated water of the United States, forms the southern boundary of the Project site.

### **II. The Corps’ Section 404 Permit**

#### **A. Requirements of the CWA**

The CWA prohibits the discharge of pollutants, including dredged or fill

material, into waters of the United States without a permit. 33 U.S.C. § 1311(a). “Waters of the United States” include certain wetlands, 33 C.F.R. § 328.3(a), (b), and the Corps determined that it had jurisdiction over many of the wetlands and other waters on the Project site. JA 477-78. When determining whether to issue an individual permit for discharges of dredged or fill material into wetlands, 33 U.S.C. § 1344(a), the Corps conducts a public interest review that balances the “benefits which reasonably may be expected to accrue from the proposal” against the proposal’s “reasonably foreseeable detriments.” 33 C.F.R. § 320.4(a)(1). The Corps will grant a request for a permit “unless the district engineer determines that [to do so] would be contrary to the public interest,” *id.*, or unless the permit application fails to meet other applicable criteria.

Among those criteria are the CWA Section 404(b)(1) Guidelines, promulgated by the United States Environmental Protection Agency (“EPA”) and found at 40 C.F.R. Part 230. *See* 33 U.S.C. § 1344(b)(1), (e)(1) (Corps regulations requiring compliance with the Guidelines). The Guidelines prohibit permits for which 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.” 40 C.F.R. § 230.10(a); *see also* 33 C.F.R. § 320.4(a)(2)(ii) (public interest review must consider “the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work”). An “aquatic ecosystem” is defined as “waters of the United States, including

wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals.” 40 C.F.R. § 230.3(c). To be “practicable,” an alternative must be “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” *Id.* § 230.10(a)(2).

The CWA Section 404(b)(1) Guidelines require the Corps to consider whether the issuance of a permit “will cause or contribute to significant degradation of the waters of the United States,” 40 C.F.R. § 230.10(c), and whether issuance of a permit will violate applicable state water quality standards. *Id.* § 230.10(b)(1). In making these determinations, the Corps may consider “appropriate and practicable discharge conditions [] to minimize pollution or adverse effects.” *Id.* § 230.12(a)(2). State water quality standards are incorporated into a CWA Section 404 permit, and an applicant must obtain a certification from the relevant state that the proposed discharge will comply with all state water quality requirements. 33 U.S.C. § 1341(a)(1).

### **B. The Corps’ review of the Permit application**

In anticipation of applying for a Section 404 permit, the Permittee began meeting with the Corps to discuss the Project’s design and potential impacts. *See, e.g.*, JA 163. The Permittee submitted an application in 2005. JA 239-353. The Corps then undertook more than two years of environmental review of the Project.

In addition to reviewing the application pursuant to the CWA, the Corps

considered whether the Project was one “significantly affecting the quality of the human environment”; if so, NEPA would require the preparation of an EIS. 42 U.S.C. § 4332(C). In order to determine whether an action’s impacts will be “significant,” an agency may first prepare an Environmental Assessment (“EA”). 40 C.F.R. §§ 1501.3-1501.4. In contrast to the more detailed EIS, an EA need only “include brief discussions of the need for the proposal, of alternatives as required by [42 U.S.C. § 4332(E)],” and “of the environmental impacts of the proposed action and alternatives.” 40 C.F.R. § 1508.9(b). Regulations promulgated by the Council for Environmental Quality (“CEQ”) provide certain enumerated factors for agencies to consider when determining if an action might be significant. 40 C.F.R. § 1508.27(b) (“significance factors”). If, after taking a “hard look” at the proposed action, the Corps concludes that there will be no significant environmental impact, the Corps may issue a Finding of No Significant Impact (“FONSI”), and need not prepare an EIS. 40 C.F.R. § 1501.4(e). The Corps may also consider mitigation requirements and conditions placed on the permit when determining whether an action will have significant impacts. *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982).

The Corps also considered the Project proposal’s potential impact on threatened or endangered species under the ESA. Federal agencies must ensure that any action authorized, funded, or carried out by that agency is not likely to “jeopardize the continued existence of any endangered species or threatened species or result in the

destruction or adverse modification of habitat of such species which is determined by the Secretary [of the Interior or Commerce] . . . to be critical.” 16 U.S.C. § 1536(a)(2). The “action agency” must consult with the relevant wildlife agency (here, the Fish and Wildlife Service) whenever a federal action “may affect” an endangered or threatened species. 50 C.F.R. § 402.14(a). The Corps engaged in “informal consultation” with the Service, *see* JA 2026, which “includes all discussions, correspondences, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required.” 50 C.F.R. § 402.02. Here, the Corps determined that the Project may affect, but is not likely to adversely affect, the wood stork and Eastern indigo snake. The Service concurred in this determination. JA 889-894. The Project was determined to have “no effect” on the scrub jay and bald eagle.<sup>1</sup> *Id.* This concluded the process required by the ESA. 50 C.F.R. § 402.13(a).

The Project as proposed would impact approximately 66 acres of wetlands and other waters on the site. The Corps also considered alternatives to the Project, including eleven other potential locations within the same general market, JA 1078-1081, and four different site plans at the location identified in the Permit application. JA 1082.

In addition to permitting the placement of fill, the Permit imposed a number of

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<sup>1</sup> The Corps later reinitiated consultation on the wood stork, Eastern indigo snake, scrub jay, and manatee. JA 1662-67. The Corps concluded that no new information changed the conclusions of the original consultation, and FWS concurred. JA 1669-1671.

requirements designed to minimize impacts of the Project, as well as a number of compensatory mitigation measures. The mitigation plan requires the creation of 13.61 acres of wetlands on-site, and 19.4 acres off-site, as well as the preservation, restoration, or enhancement of another 99.2 acres of wetlands off-site. JA 1093-1099. It also requires planting of 16.10 acres of native aquatic vegetation within the Project site's surface water ponds. *Id.* The Corps concluded that, after mitigation, the Project would result in a net increase in wetlands function. JA 1687.

The Corps then issued an Environmental Assessment and Statement of Findings. JA 1073-1125. This document serves as a FONSI for purposes of NEPA, and reflects the Corps' findings that the Project satisfied all requirements of the CWA. JA 1124. *See* 33 C.F.R. § 325.2(a)(6) (Unless EIS is necessary, Corps may issue a Statement of Findings reflecting combined decisions under NEPA, CWA, and other laws). On May 15, 2007, the Corps issued the Permit being challenged in this case. JA 913-1072.

### **III. The 2008 Permit Suspension**

Construction efforts began soon after the Corps issued the permit. The Sierra Club filed suit on October 1, 2007, after most of the wetlands on the Project site were filled. Shortly thereafter, however, the litigation was stayed because of developments at the site. On August 22, 2007, the Corps issued a first Notice of Noncompliance to the developers, noting that activities on the construction site (including discharges of

water from the site) were in violation of certain General Conditions of their CWA permit. JA 1135. The Corps visited the site again in January, 2008, and found the site once again in noncompliance. *Id.* On February 1, 2008, the Corps suspended the permit because the Permittee discharged turbid water into Cypress Creek in violation of the permit. JA 1134-37. *See also* JA 1138-1144. The Corps determined that it would further investigate the causes of the violations, in order to determine whether the violations undermined the Corps' decision to issue the permit. *See* JA 1135-37. The Corps also moved for a voluntary remand and stay of litigation pending the Corps' investigation, possible enforcement actions, and decision whether to revoke, reaffirm, or modify its prior permit decision. Pursuant to a consent decree reached with the Corps, the Permittee paid a civil penalty of \$279,000. *United States v. Sierra Properties I, LLC.*, No. 8:09-cv-1403 (M.D. Fla., Nov. 6, 2009).

The Corps thoroughly reviewed the causes of the unpermitted discharges. Meanwhile, the Corps developed, and the Permittees implemented, measures to stabilize the site and correct the initial problems. *See* JA 1672. On December 16, 2008, the Corps issued a public notice of the Corps' reevaluation of the permit. JA 1676, 1544-1573. The Corps received 65 comments from Plaintiffs as well as other interested parties (although most of these were form letters). JA 1676; JA 1221-24. The Corps also received supplemental information from the Permittee. JA 1502-82.

Following its renewed review of the Project, the Corps issued a Supplemental Environmental Assessment and Statement of Finding. JA 1672-1702. The Corps

determined that the unpermitted discharges were not the result of flaws in the original stormwater management plan. This plan was essential to the Corps' original finding that the permit met the CWA 404(b)(1) Guidelines, was in the public interest, and did not impose significant, unacceptable impacts to wetlands and water quality. The Corps then issued a modified permit authorizing the resumption of work under substantially the same conditions as the original permit. JA 1703-1704.

#### **IV. The Decision Below**

Sierra Club alleged in its Complaint that the Project would “significantly affect[] the quality of the human environment,” 42 U.S.C. § 4332(c), and that the Corps was required by NEPA to prepare an EIS. Sierra Club alleged that the Corps failed to take a “hard look” at environmental impacts during its NEPA review and challenged the Corps' application of the CWA Section 404(b)(1) Guidelines. Finally, Sierra Club challenged the Corps' determination, and the Service's concurrence, that the Project was “not likely to adversely affect” the Eastern indigo snake or the wood stork, and thus that formal consultation under the ESA was not required. After the litigation resumed following the permit's suspension, Sierra Club amended its complaint and the parties cross-moved for summary judgment.

The district court granted each summary judgment motion in part. The district court held that the Corps failed to make a “convincing case” that the Project would not “significantly” impact the human environment, and therefore the Corps' decision

not to prepare an EIS was arbitrary and capricious. JA 2194. The district court's discussion of the Project's "significance" under NEPA made no mention of the extensive mitigation measures imposed on the Project. The court held that four of the CEQ's significance factors applied to the Project, and required that an EIS be prepared.

The district court also held the Corps' compliance with the CWA Section 404(b)(1) Guidelines was arbitrary and capricious. The district court held that the Corps failed to require the applicant to provide "detailed, clear and convincing information proving that an alternative with a less adverse impact was impracticable." JA 2201. The court specifically rejected three of the Corps' practicability findings: (1) that an 8% rate of return was the minimum required for the Project's financial feasibility; (2) that the fair market value of the land rather than the actual purchase price should be used for some calculations; and (3) that the amount of parking proposed for the Project could not be further reduced. JA 2201-02, 2207.

The district court granted summary judgment to the Corps on the questions of whether the permit would cause significant degradation of Cypress Creek and surrounding wetlands, or would violate water quality standards. JA 2208-09. The district court also granted summary judgment to the Corps on Sierra Club's ESA claims, finding that the Project was not likely to adversely affect any listed species. The district court remanded the permit to the Corps. JA 2234-35. In response to subsequent briefing by the parties, the district court left in place two permit

provisions allowing completion of a road within the project site and continued maintenance of the stormwater management system. *Id.* The court denied the Sierra Club's request for injunctive relief.

These appeals followed.

### **SUMMARY OF ARGUMENT**

The district court erred in holding that the Corps violated both NEPA and the CWA. First, the court's overall review of the Corps' analysis was flawed because it failed to account for the Permit's extensive mitigation of expected adverse impacts, which reduced any impact of the Project to a level that could no longer be deemed "significant" under NEPA. Next, in addition to ignoring mitigation requirements that the court itself credited for purposes of other arguments, the court both misstated and misapplied the CEQ's significance factors, including the requirement that impacts of the Project be considered in context.

The district court likewise improperly rejected the Corps' CWA analysis. The Corps adequately assessed whether each alternative to the Project was "practicable." The Corps considered "cost" as one factor, as required by 40 C.F.R. § 230.10(a)(2). In doing so, the Corps determined that if an alternative's projected rate of return on investment was so low that no equity investment would be provided for the Project -- and thus it would not be built -- then that alternative was not "practicable." The district court's rejection of this approach ignored the record before the Corps, and

failed to defer to either the Corps' expert economic analysis or its interpretation of its own regulations. The district court compounded its errors by finding that the Corps should have used the original purchase price of the Project site in some cost calculations, or required further reduction of parking spaces at the Project, both of which are unsupported by the record. The district court's judgment should be reversed.

## ARGUMENT

### I. Standard of Review

This Court reviews a grant of summary judgment *de novo*. *National Coal Ass'n v. Lujan*, 979 F.2d 1548, 1553 (D.C. Cir. 1992).

Sierra Club's challenges to the Corps' compliance with both NEPA and the CWA are brought under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, which states that this Court may only set aside agency action, findings, and conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S.Ct. 2458 (2009) (CWA); *City of Olmsted Falls v. FAA*, 292 F.3d 261 (D.C. Cir. 2002) (NEPA). The "arbitrary and capricious standard" provides for very narrow review of agency action, and does not permit this Court to substitute its own policy judgment for that of the agency. *Bluewater Network v. EPA*, 370 F.3d 1, 11 (D.C. Cir. 2004). Rather, when applying this "[h]ighly deferential" standard, the Court "presumes the

validity of agency action,” *AT&T Corp. v. FCC*, 349 F.3d 692, 698 (D.C. Cir. 2003), and focuses principally on whether the agency examined the relevant data, articulated a “satisfactory explanation for its action,” based its decision on the relevant factors, and committed “no ‘clear error of judgment.’” *Blewater*, 370 F.3d at 11 (quoting *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

When reviewing scientific determinations by an agency, especially with respect to judgments within the agency’s area of expertise, a reviewing court “must generally be at its most deferential.” *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983); *see also Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989).

## **II. The Corps fulfilled all of its obligations under NEPA.**

### **A. The Corps’ mitigation measures rendered any impacts of the Project insignificant.**

NEPA requires a federal agency to prepare an EIS for all “major Federal actions significantly affecting the human environment.” 42 U.S.C. § 4332(C). Agencies may first prepare an EA to determine the significance of an action. Here, the Corps prepared an EA which included extensive mitigation and determined that there would be no significant impact. Thus, no EIS was required.

In making a finding of no significant impact, an agency must (1) accurately identify the relevant environmental concern; (2) take a “hard look” at the environmental consequences of the action; (3) make a “convincing case” that the

potential environmental impact is not significant enough to require an EIS; and (4) show that “even if there is an impact of true significance, [an EIS] is unnecessary because changes or safeguards in the project sufficiently reduce the impact to a minimum.” *Mich. Gambling Opposition (MichGO) v. Kemptborne*, 525 F.3d 23, 29 (D.C. Cir. 2008) (citation omitted). The district court failed to consider the fourth prong of this test when considering whether the Project would be “significant” for purposes of NEPA, *see* JA 2194.

Where potential impacts are reduced below the threshold of significance by required mitigation, the Corps may rely on this mitigation (referred to as a “mitigated FONSI”) and not prepare an EIS. “To require an EIS in such circumstances would diminish its utility in providing useful environmental analysis for major federal actions that truly affect the environment.” *Cabinet Mountain Wilderness*, 685 F.2d at 681-82 (internal quotations omitted). *See also C.A.R.E. Now v. FAA*, 844 F.2d 1569, 1574-75 (11th Cir. 1988); *Roanoke River Basin Ass’n v. Hudson*, 940 F.2d 58, 62 (4th Cir. 1991); *Sierra Club v. Espy*, 38 F.3d 792, 803 (5th Cir. 1994); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1335 (9th Cir. 1993); *Audubon Soc. of Central Arkansas v. Dailey*, 977 F.2d 428, 435-36 (8th Cir. 1992). The Corps’ conclusion in the Statement of Findings that the Project would have no significant impact, and thus that no EIS was required, was based in part on the extensive mitigation measures imposed as conditions of the Permit. The Corps concluded that “[t]he resulting impact and associated lost functions will be fully mitigated through a combination of on- and off-site

mitigation.” JA 1100. The Corps compared the Project’s wetlands impacts to the gain in wetlands acreage and function resulting from mitigation. The Corps found the project would result in a net gain in wetlands function. JA 1092. The district court ignored this critical component of the Corps’ conclusion, and its review of the Corps’ compliance with NEPA was therefore in error.

Regarding acreage, the Permit imposed a number of conditions designed to minimize the impacts on 66 acres of jurisdictional wetlands and other waters, and also required a number of compensatory mitigation measures.<sup>2</sup> *See generally* JA 1716-1782 (“Mitigation Plan”). The Mitigation Plan requires the creation of 13.35 acres of new wetlands on the Project site, in three locations chosen “because they are hydrologically appropriate and in close proximity to existing wetlands.” JA 1717. Additional mitigation would occur off-site at the Alston Mitigation Site, a “regionally significant” location chosen for its “potential to enhance, restore, and create wetland habitats that will provide improved functions and values relative to those to be impacted.” *Id.* The Mitigation Plan requires the creation of 19.4 acres of new wetlands and the preservation, restoration, or enhancement of another 99.2 acres of wetlands off-site. JA 1707. The Mitigation Work Plan details how this is to be accomplished, and requires that mitigation be performed “concurrently with site development.” JA

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<sup>2</sup> The Mitigation Plan is equally applicable to the modified permit. Minor adjustments, such as the decrease in acreage of Mitigation Area M-3 by 0.26 acres, were made, but the Corps concluded that “the changes to the mitigation plan are acceptable, as the functional gain continues to be greater than the functional loss.” JA 1687.

1745. *See generally* JA 1745-1782 (Mitigation Work Plan). The Mitigation Plan provides for long-term legal protection of the site, JA 1764, and obligates the Permittee to regularly update the Corps as to the progress of the mitigation, until such time as all the established Mitigation Success Criteria are met. JA 1765-68.

The sufficiency of the mitigation required as a condition of the Permit is not in dispute in this case. The district court explicitly found that “Plaintiffs have not submitted any information to cause the Court to second-guess the Corps’ determination that wetland mitigation is sufficient.” JA 2212. Yet the district court did not even mention the mitigation plan in its discussion of the Corps’ compliance with NEPA. JA 2194-2197. The court’s omission ignores this Court’s requirement that “[t]he court must review whether the agency . . . has shown that even if there is an impact of true significance, an EIS is unnecessary because changes or safeguards in the project sufficiently reduce the impact to a minimum.” *MichGO*, 525 F.3d at 29 (quoting *TOMAC v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006)). The court’s failure to consider this factor permeates its entire treatment of the Corps’ compliance with NEPA. Although, as we explain below, the district court also incorrectly applied the individual significance factors identified by CEQ, this Court need not address those issues. Taking all of the district court’s conclusions on these facts as correct, the Project – as mitigated -- would still not result in a “significant” impact. This Court should therefore reverse the district court’s NEPA judgment and uphold the Corps’ NEPA compliance.

**B. The district court misapplied the CEQ's significance regulations.**

The district court held that “an EIS should have been prepared,” *see, e.g.*, JA 2195, 2196, after separately analyzing four factors found in CEQ's regulations designed to help determine when a major Federal action might be significant. 40 C.F.R. § 1508.27(b). The district court misapplied each of those factors.

**1. The Project is not “significant” solely due to its proximity to wetlands.**

The district court held that “[p]rimarily, an EIS should have been prepared because the project site has ‘unique characteristics . . . such as proximity to . . . wetlands . . . or ecologically critical areas.’” JA 2195 (quoting 40 C.F.R. § 1508.27(b)(3)). This statement of the applicable standard is in error. Proximity to wetlands is not, by itself, sufficient to establish “significance.” Although the court thought it remarkable that “the project site is directly *on top* of these unique wetlands,” JA 2195, it is difficult to imagine *any* project that would require a CWA 404 permit for the discharge of dredged or fill material into jurisdictional wetlands, but would not be at least in “proximity to” those wetlands.

The CEQ regulation on which the district court relied applies to *all* federal agencies engaged in a very wide range of Federal actions. In order to avoid the reading that *all* fill permits automatically require the preparation of an EIS (which they do not), the court should have considered the site-specific “context” of those specific

wetlands (and any mitigation). The CEQ regulations state that “[s]ignificantly as used in NEPA requires considerations of *both* context and intensity.” 40 C.F.R. § 1508.27

(emphasis added). It then defines “context” as follows:

This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. *Significance varies with the setting of the proposed action.* For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

40 C.F.R. § 1508.27 (emphasis added). The district court failed to address the context in which the wetlands at the Project site are found.

The context reveals that the impact on wetlands is not significant in part because the wetlands that would be directly impacted “are of moderate quality as they were logged and some of them were ditched.” JA 1106. Although the wetlands do provide seasonal habitat for wading birds, they are predominately forested with cypress trees and are “not unique or rare in the landscape.” *Id.* The uplands of the Project site were historically used for pasture, as are areas to both the north and south. JA 485-86. The Project site is bordered by commercial and low-density residential developments to the east, and high-density residential developments to the northwest and southeast. *Id.* *See also* JA 159.

The waterbody of Cypress Creek must also be considered in context. Prior to the permit application, Cypress Creek already was not meeting state water quality

standards. JA 686. It was listed as “impaired” by the Florida Department of Environmental Protection in 2004 for exceeding total coliform levels, largely from agricultural runoff and livestock. JA 167, 172, 179. EPA also determined that Cypress Creek was “likely not meeting the State of Florida’s applicable water quality standard for dissolved oxygen (DO) due to naturally-occurring conditions.” JA 202. EPA concluded that “a pollutant is not causing the impairment,” *id.* which was “most likely” due to algae and plant growth in the wetlands. JA 207. All of these facts establish the “context” in which the district court should have viewed the “unique characteristics” of the Project site. The district court, however, applied a *per se* rule equating a Project’s significance to its proximity to wetlands. This was error.

## **2. The district court inaccurately described impacts on the wetlands.**

The district court’s discussion of wetlands impacts also rests on an important factual error. The court misapprehended the Project’s impacts on the “buffer” upland of Cypress Creek. This buffer area performs important aquatic resource functions that help to preserve the quality of the creek by moderating stormwater runoff and removing sediment, metals, and excess nutrients from waters entering the Creek. JA 1087. It also provides valuable functions such as the “moderation of water temperature, maintenance of habitat diversity, wildlife species distribution and diversity, and reduction of human impact.” *Id.* The court wrongly believed that the Project would “reduce the existing buffer by 300-500 feet resulting in a buffer width

of only 50 feet in most areas,” JA 2195 (quoting JA 574, 653) which the court equated with the buffer being “eliminated.” JA 2195. The record demonstrates that this is not the case.

Along the southern border of the Project site, adjacent to Cypress Creek, the Permit required the construction of two ponds, Ponds “D” and “E.” *See* JA 645.<sup>3</sup> These ponds, built within previously wooded areas that served as part of the upland “buffer” for Cypress Creek, are designed to control the quantity and quality of stormwater runoff from the completed Project and prevent an increase in 100-year flood elevations along Cypress Creek after the Project. JA 653. As maps of the Site make clear, *see, e.g.*, JA 645, these ponds displace only a portion of the upland buffer. The rest of this area adjacent to the Creek and within the Project site boundary is made up of wetlands, including on-site mitigation areas where wetlands will be created or enhanced, and areas of forested and pasture upland buffer that will remain undisturbed by the Project. *Id.* Thus, even with the construction of stormwater ponds “D” and “E,” the buffer between Cypress Creek and upland areas will not be “eliminated.” *See* JA 2195. Where the creek is adjacent to the pond, the minimum buffer size will be 50 feet, JA 1087, and elsewhere the buffer zone will be considerably larger, with a minimum distance of 600 feet from any paved surface. *Id.* The court’s quotation stating that the buffer would be only “50 feet in most areas” is taken from a

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<sup>3</sup> Cypress Creek is visible as a dark line among the trees just below the yellow Project boundary line on this map.

question posed to the developers early in the process, asking only about Pond E. JA 574. The response to that question, *id.*, and the Corps' conclusions in its Statement of Findings, make clear that the buffer zone between Cypress Creek and upland areas of the Project site will be larger than that in most places.

Furthermore, the district court's findings that removing the buffer areas "will result in an increase in surges of runoff with high levels of eroded sediment," and "can result in the same kind of discharge of turbid water that occurred in 2008," *id.*, are unsupported by the record. The Corps found to the contrary, as the ponds themselves will also serve as buffers to the Creek. JA 1087. The Project will provide additional protections by planting native vegetation in and around the ponds, *id.*, and by employing Low Impact Design features that will pre-treat water to further preserve water quality before it even reaches the ponds. JA 654. These features include filtering systems that are particularly effective at capturing metals. JA 688. The parking areas will be designed so that the hydrologic functions of the site will remain the same after development is completed. JA 654. To the extent that the ponds could not replicate wildlife habitat functions, that particular impact was mitigated off-site. JA 1088-89. The district court simply ignored the Corps' findings that the resulting development would provide the buffer functions of the preexisting site, and further alleged potential harms that are contradicted by the record.

The district court also found that "the Cypress Creek project location is ecologically critical because of the 'critical wildlife linkage' that connects to other

conservation lands in the area.” JA 2195. This wildlife linkage, as designated by Pasco County, includes wetlands J, P, R, and S located on the Project site. JA 1109. The permit authorized impacts only to the northern portion of wetland J, for the construction of County Road 54. *Id. See also* JA 143-44, 578, 654, 1087, 1108-09. The remainder of the on-site wetlands within this critical wildlife linkage were required to be preserved and placed under conservation easement. *Id.*<sup>4</sup>

**3. The Corps properly considered all cumulative impacts of the Project and determined that they would not be significant.**

The district court next held that “an EIS should have been prepared because the Project ‘is related to other actions with individually insignificant but cumulatively significant impacts.’” JA 2195. The Corps did not conclude, as the district court stated, that the Project would have no impacts. JA 2196. Rather, the Corps took a hard look at the environmental impacts of the Project, and determined that once these impacts were mitigated, the resulting impact would not be “significant” for purposes of NEPA. *See generally* JA 1073, 1672.

NEPA requires an agency to consider “the cumulative impacts of proposed actions.” *Natural Resources Defense Council v. Hodel*, 865 F.2d 288, 297 (D.C. Cir. 1988). A cumulative impact is “the impact on the environment which results from the

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<sup>4</sup> Although the district court held that impacts to these wetlands were “significant” enough to require an EIS, JA 2195, it also specifically retained the portion of the permit causing those impacts through road construction. JA 2234.

incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . undertakes such other actions.” 40 C.F.R. § 1508.7. The Permittee addressed the cumulative impacts of the Cypress Creek project in a 69-page appendix – prepared following extensive discussion with the Corps -- which the district court’s opinion does not mention. JA 680-748. The Corps expressly adopted this analysis in its Statement of Findings. JA 1123. This analysis was comprehensive and satisfies the Corps’ obligation to consider these actions. *Bering Strait Citizens for Responsible Resource Development v. United States Army Corps of Engineers*, 524 F.3d 938, 954-55 (9th Cir. 2008).

The cumulative impacts discussion addressed four major parameters about which the Corps had expressed particular concern: water quality, flooding, endangered wood storks, and wetlands. JA 685. The analysis concluded that the Project would not degrade water quality, and that greater protections (through the stormwater management system and a stringent water quality monitoring program) could increase water quality in the future. JA 687-88. Flooding was not anticipated to result. JA 693. The cumulative impacts analysis demonstrates that peak flows will not be exceeded by the Project and that flows in the Creek will not be increased by the Project following 25-year and 100-year storm events. JA 693; 733-748.

As to the wood stork, the Corps concluded that the Project would increase its available habitat. At the time of the cumulative impacts analysis, the wood stork was present in Florida in excess of the goal established by the Service’s Wood Stork

Recovery Plan of 1997. JA 695. The Project would increase suitable wood stork habitat within the Project site by 5.13 acres, and additional mitigation offsite where storks were known to forage would further ensure their protection. JA 1693; 699. The Service concurred in this finding. JA 2025.

The analysis also discusses wetlands impacts in considerable detail. The analysis concluded that the combination of federal and state requirements imposed on the project and neighboring developments would adequately protect wetland functions. JA 699-706. Thus, there were no significant cumulative impacts.

The Corps reviewed and adopted this analysis, and concluded that the Project – as mitigated -- will not have any significant cumulative impacts. JA 1123. The district court nevertheless found that the Corps did not conduct any analysis of cumulative impacts, quoting out of context a statement from the Federal Defendants’ Memorandum in Opposition to Summary Judgment. JA 2196. The quoted statement was in response to Sierra Club’s argument that the Corps must consider cumulative impacts of the Project on the Eastern Indigo snake. *Id.* The Corps did not address cumulative impacts on that species because the Project was found to have no impacts on the snake. JA 1119. A cumulative impact is the result of adding the incremental effect of the action to “other past, present, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.7. *Department of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004). If there is no incremental effect of the action, there is no reason for an agency to consider it in a cumulative impacts analysis. It is not the case that the Corps failed to

address cumulative impacts *at all*, and the district court erred in remanding the permit on that basis.

**4. The district court misconstrued the extent of the Project's potential impacts on threatened or endangered species.**

Whether an action “may affect” a listed species or critical habitat is the threshold generally used to determine whether consultation is appropriate under the ESA. 16 U.S.C. § 1536(a)(3); 50 C.F.R. § 402.11(b). As happened here, an agency can engage in “informal consultation” with the Service to determine whether the potential impacts of a project on a listed species will require further action under the ESA. 50 C.F.R. § 402.13(a). Where the Service concurs in a determination that the project is “not likely to adversely affect” the species, “the consultation process is terminated, and no further action is necessary.” *Id.*

The district court erred as a matter of law in stating that “an EIS should have been prepared because the project site *may* adversely affect an endangered or threatened species.” JA 2196 (citing 40 C.F.R. § 1508.27(b)(9)) (emphasis added by district court). The cited CEQ regulation requires Federal agencies to “consider . . . *the degree to which* the action may adversely affect an endangered or threatened species” as one indicator of the “intensity” of a Federal action, which is only one component of whether an action will “significantly” affect the human environment (the other being the “context” of the action). 40 C.F.R. § 1508.27(b)(9)) (emphasis added). The district

court's requirement that *any* potential adverse impact to a listed species renders a Federal action "significant" is not the law, and requires reversal.

In addition, the record establishes that the Corps adequately considered "the degree to which the action may adversely affect" listed species. Pursuant to the consultation requirements of Section 7 of the ESA, *see* 50 C.F.R. § 402.13(a), the Corps engaged in informal consultation with the Service about potential impacts to four listed species: the wood stork, the Eastern indigo snake, the scrub jay, and the bald eagle. The Service concurred in the Corps' determination that the project would have "no effect" on the scrub jay or the bald eagle. JA 2026. The Service also concurred in the conclusion that the Project "may affect, but is not likely to adversely affect," the wood stork and the Eastern indigo snake. *Id.* The district court's conclusion that "[d]estroying the habitats of the Indigo Snake and the Wood Stork clearly may adversely affect these protected species," JA 2196, is contrary to the record and does not accurately reflect the appropriate standard for determining whether the Project will "significantly" affect the human environment under NEPA.

When reviewing the agencies' ESA compliance, the district court upheld the Corps' and Service's conclusions that the Project was not "likely to adversely affect" the Eastern indigo snake. JA 2211-12. The court based its decision largely on "the fact that there is nothing in the record to support a conclusion that the Eastern Indigo Snake actually occupies the [Project] site." JA 2211. This is correct – in four years of wildlife surveys on the Project site, not one Eastern indigo snake was observed. JA

1978. Even so, the Corps required the Permittee to comply with standardized protection measures, JA 1119, and the Service found these measures adequate to address any possible adverse effects to the snake. JA 2026.

The district court also upheld the agencies' conclusions that the Project was "not likely to adversely affect" the wood stork. JA 2212. The Service agreed with the Corps that, as a result of the mitigation measures imposed by the Permit, wood stork foraging habitat would be increased (even accounting for a delay in the growth of the new vegetation and for "some loss due to habitat creation failure"). JA 2025. The Permit requires the planting of vegetation between constructed foraging habitat and the adjacent road to preclude interaction between feeding wood storks and vehicles. JA 1119. Informal consultation was successfully concluded for both the Eastern indigo snake and the wood stork.

Yet despite upholding these conclusions, the district court held that the Project was "significant" for purposes of NEPA due to "[d]estroying the habitats of the Indigo Snake and the Wood Stork." JA 2196. Although the Project will modify some existing wood stork foraging habitat during construction, it is undisputed that the completed Project will increase the available habitat. *See, e.g.*, JA 2025; 1118. *See also* JA 1693 (the turbid discharges resulting in permit suspension "had a minimal effect on wood stork foraging habitat"). The district court did not address the Corps' reasonable conclusion that this increase in habitat, coupled with protective measures to shield wildlife from the road and to preserve water quality, means the Project is

“not likely to adversely affect the wood stork.”

Nor should the district court have remanded the Permit on the basis of potential destruction of *possible* Eastern indigo snake habitat, given that no snakes were observed on the site. The Eastern indigo snake is “widely distributed throughout central and South Florida.” SJA 2259. Although Eastern indigo snake habitat is sometimes associated with gopher tortoise burrows, such as those found on the Southern portion of the site, JA 1977, the presence of these burrows is not definitive evidence of the presence of the Eastern indigo snake. These burrows are less likely to provide shelter from cold temperatures in central Florida, where the Project site is found. SJA 2261. The record supports the Corps’ conclusion, and the Service’s concurrence, that the Project is “not likely to adversely affect the Eastern indigo snake.”

The district court omitted a critical component of the CEQ regulation on which it relied. The regulation requires that an agency consider “*the degree to which* the action may adversely affect an endangered or threatened species.” 40 C.F.R. § 1508.27(b)(9). Here, the agencies correctly determined the degree to which the wood stork and the Eastern indigo snake would be affected, concluding that the effects will not be “significant.”

Although there is a legal distinction between determining whether a major Federal action is “significant” under NEPA and whether it will require a certain level of consultation under the ESA, those decisions are closely linked as a factual matter.

Both require some documented consideration of the possible effects of the proposed federal action on the species in question. Here, the Project will benefit the wood stork by increasing habitat, and could have no effect on the Eastern indigo snake at all if there are none on the property. It is not arbitrary and capricious to conclude that an EIS is not required in those circumstances. To require an EIS for any project on which the Service and a federal agency engage in informal consultation, even when they conclude that no adverse effect is likely, is to improperly promote form over substance.

Other courts of appeals have upheld an agency's determination that an action is not "significant" under NEPA even where an adverse effect on a listed species *was* likely, and the Service issued an incidental take statement for the species. *See, e.g., Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1277 (10th Cir. 2004); *Ramsey v. Kantor*, 96 F.3d 434, 437 (9th Cir. 1996); *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 546-47 (11th Cir. 1996) (upholding the Corps' decision not to prepare an EIS in connection with a landfill even where the Service issued an incidental take permit anticipating take of 130 Eastern indigo snakes).

The district court's ruling is clearly contrary to the results in those cases. Also, the district court's reliance on *Grand Canyon Trust* is misplaced. JA 2197 (citing *Grand Canyon Trust v. Federal Aviation Admin.*, 290 F.3d 339 (D.C. Cir. 2002)). That case turned entirely on the definition of "cumulative impacts." *Id.* at 340. The petitioners in that case did not bring an ESA claim, and the opinion does not mention 40 C.F.R.

§ 1508.27(b)(9). Certainly, the case cannot be said to stand for the proposition that the potential for adversely affecting a listed species “is all that is necessary to require preparation of an EIS under NEPA.” JA 2197. That is not the law. The district court erred in finding that the Corps was arbitrary and capricious in issuing the permit in violation of 50 C.F.R. § 1508.27(b)(9).

**5. The Project does not threaten violation of Federal, State, or local laws.**

The district court concluded its review of the Corps’ NEPA compliance by holding that “[f]inally, an EIS should have been prepared because the project site ‘threatens violation of Federal, State, [and] local law[s], imposed for the protection of the environment.’” JA 2197 (citing 40 C.F.R. § 1508.27(b)(10)) (alterations in district court opinion). The court appears to have reached this conclusion for two reasons: 1) the “adverse environmental consequences” of previous discharges in 2008 would make future potential consequences more harmful; and 2) that past violations of the conditions of the permit at the site made future violations more likely. *Id.* The district court was incorrect on both points.

After the Corps suspended the permit in February 2008, it spent over a year and a half conducting a further review of the environmental consequences of the permit violations and considering whether the original Permit design was insufficient to protect the environment. *See generally* JA 1672. After collecting and reviewing water quality and sediment data at the site, the Corps concluded that “the effect of turbid

conditions was temporary in nature and does not alter the previous conclusion that . . . the project will not have any significant cumulative impact.” JA 1699. The Southwest Florida Water Management District informed the Corps that the Permittee’s state water quality permit remained valid, and that the State believed that the storm water management system’s design was adequate. JA 1672.

The Corps also concluded that “there is no evidence to suggest that the discharges were a result of a fault in the design of the storm water management system.” *Id.* The first discharges, in July and August 2007, were the result of sediment fences that failed. JA 1673. A second discharge, occurring in January 2008, occurred primarily because the Permittee failed to raise the height of the outlet structure at Pond “D” until “after an unusual 5+ inch rain event that occurred outside of the normal rainy season.” *Id.* The final discharge, on April 9, 2008, “was due solely to the failure to effectively plug the pipe inlets to the storm water ponds.” *Id.* Each of these readily identifiable and correctable problems did not require modification of the original Permit, in the considered view of the Corps. *Id.* Nothing in the Corps’ Supplemental Statement of Findings suggests that future discharges are likely, and the district court erred in holding to the contrary without addressing the Corps’ reasoning.

The court instead posited that “NEPA regulations make no exception for human error.” JA 2197. The NEPA regulations at issue here (defining “significantly”) state that “[w]hether the action threatens a violation of Federal, State, or local law” is a factor that “should be considered in evaluating intensity.” 40 C.F.R. § 1508.27(b)(10).

Here, the Corps found that the Permit did not threaten any violation of its own terms, and reasonably relied on the determinations of the Southwest Florida Water Management District, JA 1668, and the Florida Department of Environmental Protection, JA 1213, that those agencies' respective permits also did not threaten future violations. *See* 33 C.F.R. § 320.4(d) (Corps may rely on a State's certification that State water quality standards are met, unless EPA advises otherwise).

The district court's own opinion supports this conclusion elsewhere. The Corps' compliance with the CWA 404(b)(1) Guidelines required the Corps to consider whether issuance of a permit will cause or contribute to significant degradation of the waters of the United States. JA 2208-09; 40 C.F.R. § 230.10(c). The district court considered the Corps' review of the discharges that led to suspension of the permit, and upheld the Corps' conclusions that "the permit would not cause or contribute to degradation of the waters of Cypress Creek and surrounding wetlands," and that "the stormwater management design remained sufficient." JA 2209 (citing JA 1672-73). The court concluded that "[t]he record demonstrates that the Corps thoroughly and reasonably considered the relevant factors," and "the Corps lawfully concluded that the modified permit would not cause or contribute to significant degradation." JA 2209. It is very difficult to reconcile this holding with the court's apparent view that future violations of the permit are so likely as to render the Project "significant" and require an EIS.

Neither the regulations of the Corps or CEQ suggest that a permit violation

renders future violations inevitable, or even considerably more likely. Instead, this possibility is a factual matter for the Corps to consider on a case-by-case basis. Here, the Corps considered in detail the cause of the past violations and the likelihood of any future violations, in a year and a half of analysis of supplemental information submitted by the interested parties. The Corps conducted its own investigation as well, inspecting the site and meeting with the relevant actors. The Corps' final determination that the design of the permit conditions is sufficient to preserve water quality is due considerable deference. *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1490 (D.C. Cir. 1995). The district court's failure to grant this deference, or to account for the Corps' findings in the Second Supplemental Statement of Findings, was error.

**C. Cumulatively, the “intensity” factors analyzed by the district court do not require an EIS.**

Although the district court appears to have considered four of the CEQ's factors indicating “intensity” as separate grounds for remanding the Permit, JA 2194-97, the factors are designed to be considered together, so that an agency can determine the overall significance of a proposed Federal action. In this case, the Project would not result in “significant” impacts requiring an EIS, given the extensive mitigation required and the fact that the impacted wetlands were of only moderate quality due to both natural conditions and the effects of surrounding development.

The Project's proximity to wetlands was accounted for through comprehensive mitigation, the establishment of a buffer zone between construction and waters not

filled by the Project, and the incorporation of a number of important state-required environmental protections. The conclusion that impacts would not be significant was buttressed by a supplemental Statement of Findings following the suspension of the Permit. Impacts on the Eastern indigo snake could not be significant because nothing in the record suggests that the snake is present on-site. And the district court's hypothesis that future violations of Federal or State law are more likely is unsubstantiated and inconsistent with the court's other findings that the stormwater management system is viable and consistent with the CWA's protections. In its permit conditions and mitigation measures, and its environmental assessment, the Corps made a "convincing case" that the Project, viewed as a whole, will not "significantly" affect the human environment, and therefore did not require an EIS. *MichGO*, 525 F.3d at 29. The district court erred by wholly ignoring the extensive mitigation and by misapplying the CEQ regulations, and must be reversed.

### **III. The Corps fully complied with its CWA obligations.**

The district court erred in holding that the Corps' analysis of the Project under the CWA, including application of the CWA Section 404(b)(1) Guidelines, was arbitrary and capricious. The court acknowledged, but failed to apply, the highly deferential standard of review due to the Corps in making its determinations. *AT&T Corp. v. FCC*, 349 F.3d 692, 698 (D.C. Cir. 2003). The district court's review should have been limited to determining whether the Corps had "considered the relevant

factors and articulated a ‘rational connection between the facts found and the choice made.’” *Allied Local & Reg’l Mfrs. Caucus v. United States Environmental Protection Agency*, 215 F.3d 61, 68 (D.C. Cir. 2000) (quoting *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Instead, the district court substituted its own policy judgments for that of the agency, *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), rather than address the explanations that the Corps gave in the record for its ultimate conclusions. The Corps’ determinations are all well supported in the record, reflect a reasoned, expert judgment, and should be upheld.

**A. The Corps considered an appropriate range of alternatives and identified the least environmentally damaging practicable alternative.**

The CWA Section 404(b)(1) Guidelines provide, among other things, that a 404 permit may not be issued if “(i) there is a practicable alternative which would have less adverse impact and does not have other significant adverse environmental consequences.” 40 C.F.R. § 230.12(a)(3)(i). A “practicable alternative” is one that is “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” 40 C.F.R. § 230.10(a). Here, the Corps considered a number of alternatives to the Project, and ultimately issued a permit for a Project that would impact nearly half the acres of wetlands contemplated in the original permit application.

For projects such as this, which are not “water dependent,” the availability of a practicable alternative site that does not involve special aquatic sites (such as wetlands, 40 C.F.R. § 230.41) is initially presumed, but may be rebutted. 40 C.F.R. § 230.10(a)(3). *See also* 45 Fed. Reg. 85,339 (preamble to CWA Section 404(b)(1) Guidelines). The Corps first conducted an “off-site alternatives analysis,” considering whether the Project could be located on a different site. The Permittee submitted an analysis of eleven alternatives to the Project site within the Northeast Tampa regional market. JA 440-470. Of these other sites, JA 445-451, some were eliminated because they were not large enough to support a regional retail center, and others were eliminated because they were not for sale. JA 466. The only potentially viable site was located in an area with insufficient population density and growth potential to support a development of this type. JA 467-68; 1078-82. Thus, the Corps found no practicable off-site alternative to the Project site, JA 1081-82, which was “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” 40 C.F.R. § 230.10(a).

The Corps then considered a number of on-site alternatives, to determine whether impacts could be minimized. The Project, as originally proposed, would have included 252 multi-family residential units, covering a little over thirteen percent of the land on the site. *See, e.g.*, JA 147, 150. The original design contemplated impacts to 103.7 acres of wetlands on the Project site. JA 153. The Corps’ Statement of Findings considered a similar proposal as “Alternative A,” and compared this to three

alternatives that each further reduced impacts on the wetlands on the site. JA 1082; 249-51; 494-96.

Alternative D, which was eventually selected as the environmentally preferred alternative, JA 1100-1101, reflected a number of significant changes from the original development proposal. In comparison to Alternatives A, B, and C, the selected alternative (D) eliminated the multi-family residential units in the southern parcel, relocated the stormwater facility into uplands and reconfigured the Project footprint in the southwest portion of the site. JA 1082. Alternative D also reflected greater refinement of stormwater and flood control facilities that further reduced impacts on wetlands by more than ten acres. *Id.* As a result, the selected alternative would impact 53.89 acres of wetlands, in comparison to the 106 acres of wetlands that would have been impacted by Alternative A. *Id.*

**B. The Corps appropriately relied on an 8% rate of return as a threshold of practicability.**

Having considered a number of alternatives, the Corps then considered whether further reduction in adverse environmental impacts was possible. JA 1085. The Corps considered four versions of Alternative D, reducing its footprint on the site by 5%, 10%, 15%, and 20%, respectively. *Id.* One of the factors the Corps must consider in determining the practicability of an alternative is its “cost,” 40 C.F.R. § 230.3(q), so the Corps looked to whether the project proponent could secure financing for each alternative. The Corps’ underlying assumption was that, if financing

was completely unavailable for an alternative design, it would not be built, and would thus not be “practicable” due to its “cost.” The Corps reached this conclusion by projecting the rate of return on investment for each alternative.

**1. The administrative record supports use of an 8% rate of return as a minimum practicable rate.**

The Corps determined that an 8% rate of return was the minimum rate at which the Permittee could secure the financing necessary to build the Project. Equity investment was unavailable for the Project for any configuration projected to return less than 8%. The Corps reasonably concluded that a configuration projected to return less than 8% was not “practicable.” In reviewing the four reduced-footprint alternatives to the proposed Project, the Corps concluded that none were “practicable,” because “even deleting just one bank from the project would bring the Rate of Return below 8%.” JA 1086.

The court did not identify any problems with the general approach to practicability taken by the Corps (*i.e.*, the Corps’ consideration of whether or not financing could be secured for a particular version of the Project). The preamble to the CWA Section 404(b)(1) Guidelines, in response to comments asking for the explicit consideration of economic factors, explains that “the Guidelines explicitly include the concept of ‘practicability’ in connection with both alternatives and steps to minimize impacts. If an alleged alternative is unreasonably expensive to the applicant, the alternative is not ‘practicable.’” 45 Fed. Reg. 85,336, 85,343 (Dec. 24, 1980). The

Corps evaluates practicability from the perspective of the industry, rather than that of an individual applicant. “When private enterprise makes application for a permit, it will generally be assumed that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the market place.” 33 C.F.R. § 320.4(q).

The district court found that the Corps had not adequately demonstrated that an 8% rate of return was the minimum practicable rate. JA 2203. The district court’s opinion is inconsistent with the administrative record and fails to grant the required amount of deference to the Corps’ evaluation of highly technical financial projections. The Corps articulated a “satisfactory explanation for its action,” based its decision on the relevant factors, and committed “no ‘clear error of judgment.’” *Bluemater*, 370 F.3d at 11.

First, the Corps was entitled to assume that the Permittee had completed the appropriate economic evaluations and the need for this type of Project in the Tampa area. Next, the Corps’ reliance on an 8% rate of return was amply supported by financial records and studies submitted by the Permittee. The Corps also independently verified this information, 40 C.F.R. 1506.5(a), and discussed its reasoning in considerable detail in the original Statement of Findings, JA 1086, its supplemental Statement of Findings, JA 1677-79, and in an additional analysis prepared by the Corps’ Jacksonville District Socio-economics Branch, JA 1657-1661. Within this analysis, the Corps’ economic experts concluded that “[u]pon review of

the evidence provided it is maintained that the 8% is a reasonable minimum” rate of return. JA 1658. Focusing on this language, rather than on the Corps’ final conclusions stated in its Supplemental Statement of Findings, the district court found that “the applicant proved that the 8% rate of return is ‘reasonable,’” but “never proved anything less than an 8% rate of return would be *impracticable*.” JA 2203. The court erred on this point.

The district court specifically noted that in one report, “a 7.7% and 7.6% rates [*sic*] of return were listed as ‘average’ rates of return for regional malls and power centers in the Tampa area.” JA 2203. These lower numbers come from a 2006 report that provided a going-in capitalization rate for both a regional mall and a power center in the Tampa area. JA 831. The going-in capitalization rate is the ratio of first year net operating income divided by present value or purchase price. JA 835. However, these rates do not reflect the added risk of investment in a new development project, and they could only be accurately compared to the Project if the Project were fully leased and operating at the same time that those rates were reported. JA 1678. Taking this into account, the Permittee calculated the increase in the rate of return for the Project necessary to take into account the risk of new investment. *Id.*

Specifically, the Permittee calculated its minimum required rate of return by adding 0.5% to the rates reported for “existing properties that have already been developed, leased and operated for a number of years.” JA 650. The Permittee informed the Corps that this 0.5% increase was the “bare minimum” necessary to

attract investment. *Id.* The Corps further verified this adjustment by reference to real estate industry surveys and reports, which reported risk adjustments ranging from 1.5% to 3%. JA 1679. The Permittee's 0.5% adjustment resulted in required initial capitalization rates for a retail mall of 8.8%, on average, from 1998 to 2005, JA 651, and as low as 8.1% between 2003 and 2005. These numbers were all confirmed in correspondence from a financing group, explaining that if the rate of return for the Project "does not reach at least 8.0%, the project is not financeable and *would never be initiated* because the return on the equity portion of the financing will be too low for the necessary equity participation." JA 1578 (emphasis added).

In addition, much of the financial data submitted by the Permittee and reviewed by the Corps suggested that a rate of return higher than 8% could be required for the Project to go forward. *See, e.g.*, JA 1679 ("industry professionals further reported minimum capitalization rates for a development property ranging from 8%-11%); JA 1658 (explaining that one report estimates "the risk premium for new development at 1.5% to 3%," which would require a rate of return for the Project of 9.1% to 10.6%). Thus the record contains ample evidence demonstrating that financing would not be available for any alternative with a projected rate of return of less than 8%.

This range of potential rates of return was another basis for the district court's decision. The court reviewed these higher numbers and stated that "[t]aking the Corps evidence at face value demonstrates the 8.0% rate of return itself would be

unworkable.” JA 2203. This holding fails to account for much of the evidence just discussed, and would also hold the Corps to an improper standard for reviewing development projects.

In this case, the project proponent believed it could secure financing with an 8% rate of return, and the Corps thoroughly verified this claim to determine whether financing would be available at a *lower* rate of return. This approach was consistent with the Corps’ obligation to consider the practicability of alternatives with fewer adverse environmental impacts, as a lower rate of return would result from a smaller footprint or a project otherwise modified to preserve environmental resources (rather than generate a return on investment). It makes little sense in this context to require the Corps to inquire whether the Permittee could *expand* its Project footprint, thereby potentially increasing its environmental impacts. That the record discloses and discusses a range of required rates of return for developments such as the proposed Project cannot render the Corps’ determination arbitrary and capricious when it relied on a rate at the very bottom of that range. The district court failed to address the Corps’ discussion of the evidence before it, and it failed to acknowledge that by holding the Permittee to the “bare minimum” rate of return that its evidence would support, the Corps chose the least environmentally damaging alternative that could possibly secure financing and would therefore be “practicable.”

**2. The Corps reasonably relied on the Permittee's economic feasibility studies assessing the practicability of alternatives.**

The Permittee submitted a number of studies assessing the feasibility of proposed alternatives, at the Corps' request. JA 608-636. These studies included tables detailing the various costs of the different alternatives, and calculating the projected rate of return for each one. *Id.* The first line item on each of these tables is the "base value" of the land, for which the Permittee used the estimated fair market value of the land as of 2006. As the Corps explained, "[s]ound economic principles dictate that when considering an investment, one must consider the opportunity cost of doing so . . . [T]he opportunity cost of developing the land is equivalent to the price the developer could sell the land for on the open market." JA 1660. "While a recent purchase price is often a very good proxy value for present value, a historic purchase price is not. It is a particularly poor proxy when considering real estate in Florida because, over the last 100 years, real estate in Florida has increased in value far faster than general goods and services." *Id.*

The district court disagreed, holding that the feasibility studies ought instead to have relied on the price paid for the land eighteen years earlier. JA 2205; 1373 (1988 deed for the Project site). Citing no authority, the court found that "[b]y using 'land value' instead of land 'cost' in its cost calculations, the applicant was able to foreclose the consideration of practicable alternatives, which the regulations mandate." *Id.* The

district court held that the definition of “cost” in the CWA Section 404(b)(1) Guidelines applied to the Permittee’s estimates of the “cost” of elements of the various alternatives, and required the Permittee to use the purchase price of its land in those calculations. *Id.* The court misapplied those regulations.

As an initial matter, the district court was incorrect that the Permittee was somehow manipulating the record before the Corps. It is not true that “the applicant was permitted to control the numbers in order to prevent alternatives from being practicable,” JA 2206, and the record clearly does not support this belief. The district court’s concern stemmed from the fact that, for this property, the estimated 2006 resale value (\$72 million) was higher than the original purchase price. Had the original purchase price been used, then the resulting calculations might have suggested that some alternatives were practicable that were not considered practicable in the record before the Corps. But it will not always be the case that the original purchase price will be lower than the present-day estimated fair market value, especially in a depressed commercial real estate climate. In those situations, use of the original purchase price will foreclose alternatives that would otherwise be available if the fair market value of the land were used instead. The district court did not address this, and failed to justify a legal rule requiring the use of historical purchase price in all future economic feasibility analyses. JA 2207.

The district court’s opinion confuses two distinct issues – the overall “cost” of an alternative that would affect its practicability under 40 C.F.R. § 230.10(a), and the

method of calculating the underlying values used to determine that cost. In fulfilling its regulatory obligations, the Corps used the availability of financing as its measure of the “cost” of an alternative. *Supra* at 37-42. The district court described the Corps’ approach incorrectly when it stated that “[t]he plain language of the regulation directing the Corps to take cost into consideration cannot be confused with potential, hypothetical future profit, as the Corps is allowing the applicant to do so here.” JA 2206.

The line item for base property value in the Permittees’ economic feasibility tables represents an altogether different value than the “cost” contemplated in the CWA Section 404(b)(1) Guidelines. That “cost” is best reflected by the last line of the tables, which is the rate of return as a percentage of “total costs.” *See, e.g.*, JA 626. The foregone opportunity cost of selling the land (as opposed to developing it) is but one of the many factors in determining the overall feasibility of proposed alternatives. JA 1660. Other important factors included the sources of rental income from developments of the Project, such as major retail, a movie theater, and restaurants, which changed depending on which alternative was being considered. JA 608-636.

The Corps’ Socio-economic branch concluded that because “the opportunity cost of developing the land is equivalent to the price the developer could sell the land for on the open market . . . the Permittee would be correct to include an estimate of the land’s present value in his financial feasibility analysis.” JA 1660. This determination is one to which the district court should have deferred. *See, e.g., City of*

*Waukesha v. United States EPA*, 320 F.3d 228, 247 (D.C. Cir. 2003). At a minimum, the district court should have addressed the Corps' explanation as given in the record, especially on such technical matters. *Allied Local & Reg'l Mfrs. Caucus*, 215 F.3d at 71.

**C. The Corps reasonably concluded that impacts of parking could not be further minimized.**

Finally, the district court erred by remanding the Permit for failure to demonstrate that further reducing the number of parking spaces was impracticable. JA 2207-08. The Corps "heavily scrutinized" both the type and quantity of parking requested by the Permittee, as "impacts due to parking for this project account for 43.34% of wetland impacts." JA 1083. Pasco County requires retail developments to provide one parking space for every 300 square feet of retail space, but the Permittee proposed building one parking space for every 200 square feet of retail. JA 1084. The Permittee also proposed building 15 parking spaces for every 1000 square feet of "sit-down" restaurants, although Pasco County only required 10 spaces for the same area. *See* JA 655. For other types of uses (such as banking and hotels), the Permittee did not seek to build more parking spaces than were required by Pasco County regulation. *Id.* Initial information submitted by the Permittee to support its parking plans cited "shopping center industry standards," which the Corps found "unclear." JA 639. The Corps therefore requested additional information to explain the disparity between Pasco County's requirements and the number of spaces requested by the Permittee. JA 639-640.

The Permittee explained that although Pasco County provided the legally-required minimum, the Project would require additional parking in order to be successful. JA 1084. For one, the Project would include at least double the amount of restaurant space (which requires more parking than retail establishments) than other existing malls in the Tampa Bay Area. JA 655-57. The Permittee explained that if half the restaurant usage was converted to retail, the Project would then require less parking than four nearby malls. JA 657. However, because trends in development have moved towards a higher density of restaurant and entertainment uses, the Project could not attract retailers if less than 8.08% of the Project was to be used for restaurants. JA 657; 1084. Thus, the proposed number of spaces was required for the Project to go succeed.

In addition to requiring more restaurant usage, the retail tenants that the Permittee hoped to attract all required a minimum of 5 spaces per 1,000 feet of retail space. JA 656. The Permittee submitted evidence of the site design requirements of Target, Kohls, Costco and Bass Pro Shops, each of which require at least 5 spaces per 1,000 feet of retail space. JA 774; 846-52. A study of 26 regional malls demonstrated that other comparable developments had, on average, 6.1 spaces for every 1,000 square feet of “gross leasable area.” JA 856-57. The Permittee explained that exceptions to these requirements could only be found in urban areas where employees and patrons are likely to use mass transit, JA 656, a situation not applicable to the Cypress Creek Project.

Thus, the Corps found that impacts on wetlands from parking could not be further avoided (beyond the imposed reductions) by reducing the quantity of parking spaces. JA 1083-84. The Corps also required the Permittee to consider whether it could add an additional parking garage to the 2,000 unit parking structure already planned for Phase II of the Project, because replacing surface parking with garage parking could reduce the Project footprint and further avoid wetlands impact. JA 1083. The Permittee submitted a financial feasibility study that demonstrated the extra cost would render the entire Project impracticable, because financing would not be available. *Id.* In addition, the tenants of the “power center” on the north parcel, most of which are large, stand-alone retailers, would not accept a parking garage at all. JA 1084.

Despite this reasoned explanation, the district court held that the Corps’ decision that parking impacts could not be further avoided was arbitrary and capricious. JA 2207-08. The court did not address any of the studies indicating that current mall developments, and the site design requirements of major retailers, all require more parking than might be found at older malls. Nor did the court address the fact that building an additional parking structure would both prevent the attraction of major stand-alone retailers and decrease the Project’s rate of return to the point where financing would be unavailable. The Corps’ determination that further reductions in parking were impracticable is well supported by the record, and was not arbitrary or capricious.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type limitations of Fed. R. App. P. 32(a)(7) and the volume limitation set by this Court's March 25, 2011 Order in this case, because this brief contains 12,291 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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**CERTIFICATE OF SERVICE**

I hereby certify, pursuant to D.C. Cir. R. 25(d), that on this 6th day of July, 2011, I filed the foregoing **Final Opening Brief of the Federal Appellants** using the CM/ECF system of the DC Circuit Court of Appeals, and each of the counsel of record listed below are registered to be served electronically by that system:

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