mined while the Lake Belt plan is subjected to further study, or whether they anticipated denial of permits as part of their business plan.[173] The "costs normally associated with" limestone mining are not specified in the record and, consequently, there is no basis for the Corps' conclusion that the costs of stopping mining would be "substantially greater" than the usual costs of limestone mining.[174]

The ROD contains similarly illogical statements. For example, the Corps notes that the alternative to facing the "costly process" of further takings challenges brought by the mining companies, is "public acquisition of the lands." AR1028 at 37. While that statement is true, the Corps then makes a giant leap to conclude that public acquisition of the unmined lands would require all of the following: purchase of 40 square miles of land owned by the mining industry, removal of the roads, railways, processing plants, and other infrastructure, and removal of the drainage works -- which would require purchase of the remaining 31 square miles of privately owned and 16.5 square miles of publicly owned lands. AR1028 at 37. Having determined that the "no action" alternative would lead either

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the specific mining companies, but also its data source is questionable. The "methodology employed was to distributed a written questionnaire to Lake Belt mining interests." In light of the purpose behind the study, i.e., to gain approval of permits for those same mining interests, this report has limited, if any, value. AR614.

[173]This is particularly true in light of the prior success of at least one of the permit applicant's regulatory takings challenges. While this Court disagrees with the takings determination in the Florida Rock cases, it is nevertheless the case that the record reveals a successful challenge and no evidence that compensation would not be awarded as to any current permit denials -- if the property owner could prove their case, of course.

[174]It is reasonable to assume that the costs of limestone mining in any area of environmental significance are high, and that the risks of denied permits are taken into account in the mining companies' business plans.

to future takings challenge, or to purchase of the entire universe of the Lake Belt, the Corps handily rejected the "no action" alternative. The Corps did not even address the benefits of denying future permits for mining in the area. Having jumped from one extreme (total restoration at great financial cost), to the other (full mining and continued degradation), the Court failed to consider a middle ground, e.g., simply stopping the mining first, and then proceeding step by step to restore the area when funding is available.[175] Because of these (illogical) determinations, both of the "no action" alternatives quickly were dismissed without the Corps conducting the evaluation required by NEPA. 40 C.F.R. 6.203(b)(1), (c), 40 C.F.R. 1502.14(d).

ii. "curtail future mining"

According to the Corps, mining the 5,000 acres in Miami-Dade subject to existing permits (i.e., without any new acreage being approved) would last only fifteen years, at which time rock would have to be brought in from elsewhere. Since that imported rock now only constitutes 1% of the State's annual consumption of rock, "it would take time to increase outside sources of rock imports to equal future demands. Florida must, therefore, continue to supply the majority of the State's crushed rock needs for years to come." AR614 at 71-72. The fact that "Florida" must continue to supply its own crushed rock needs does not translate to a requirement that mining must be permitted to continue in the Lake Belt. The Federal Defendants acknowledge that the Lake Belt area supplies "over half" the crushed stone for the entire state, Reply brief, Docket Entry #42, at 7, so

[175]The adage that when you realize you're in a whole, the first thing to do is stop digging, seems apt here.

apparently as much as 40% or more of the state's rock needs are supplied by other locations in Florida (1% foreign origin, "over half" from Lake Belt). The use of "therefore" does not render an otherwise unsupported conclusory statement meaningful. It is impossible for the Corps to be protected by the shield of deferential review when its "decision is so implausible that it cannot be the result of differing viewpoints or the result of agency expertise." Sierra Club at 1216. The "curtail future mining" alternative was eliminated not based upon facts at the time of the Corps' analysis, but rather because it might be infeasible at some point toward the end of the next fifteen years. This reveals that the permits as issued, which allow mining in areas not previously permitted, are not the environmentally preferable alternative, for the "curtail future mining" alternative would have permitted approximately the same amount of acres to be mined, i.e., a similar benefit to the mining companies, but within previously approved areas and, presumably, with less adverse effects and for a shorter period time. Thus, the Corps' decision was not in compliance with NEPA.[176]

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[176]Even in light of the mandated deferential standard of review, the Court cannot condone the Corps' short analysis as being sufficient to meet the rigorous demands of NEPA. Mere "snippets do not constitute real analysis" Natural Resources Defense Council, Inc. v. Hodel 865 F.2d 288, 299 (D.C. Cir. 1988) (simply announcing that protected species may be exposed to risks of oil spills was insufficient analysis under NEPA). "These perfunctory references do not constitute analysis useful to a decisionmaker in deciding whether, or how, to alter the program to lessen cumulative environmental impacts." Id. at 299.

iii. Comprehensive mining plan[177]

Both DERM and SFWMD complained to the Corps in 1999 that the comprehensive mining plan alternative in the draft EIS did not accurately represent the work of the Lake Belt Issue Advisory Team and the result of its study of several alternatives. AR606. Specifically, the timing of mining, particularly near the wellfield, in the Team's plan differed from that described in the comprehensive mining plan, and the Team had not reached a consensus as to mining in the area south of Tamiami Trail, i.e., closest to ENP. [178] The Corps proceeded with the alternatives described above – the analysis of which, in the EIS and ROD, was exceedingly brief. The Corps' preparation of the NEPA documents, including its early preparation of permit templates even before the EIS was published, reflected the Corps' intention that the preferable alternative was and would be the "comprehensive mining plan."

d. The "bridging permits" mask the Corps' intention to permit mining for fifty years

As noted at the beginning of this opinion, Plaintiffs allege that these really are fifty

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[177]Kendall Properties mining company asserts there was no such thing as a "miners' recommended plan," and that they always fully intended to mine all of what they own and would not have agreed to some compromised "plan." "It is, and always has been, our intention to mine to the western boundary of our property. The Issue Team 'disagreement' came about because the issues of seepage, and possible mitigation for induced seepage, if any, could not be sufficiently addressed by the Team." AR605 at 216.

[178]Beyond the mining proposed in the comprehensive plan, one of the mining representatives suggested that the Corps analyze yet another option. "[T]o provide 'bookends' the Corps may want to include [another] alternative of allowing 20,000 or 30,000 acres of additional mining instead of the 8,400 [new] acres evaluated in the Comprehensive Mining Plan." AR610. The Corps rejected that idea.

year permits, perhaps clothed as 10 year (or 14 year or 16 year) permits, but nevertheless designed to lead to full mining of the Lake Belt area. The Court agrees, and finds that this surreptitious approach to permitting does harm to the principles of NEPA, and the APA, as well. Other courts have noted how environmental analyses can become distorted when the initial phases of a project already have been approved. See, e.g., Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2002) (enjoining first phase of a project because, although the harm would arise from later phases, of risk that the NEPA alternatives analysis would be skewed toward completion of the project if any construction was allowed before a complete environmental analysis was done). As the now Justice Breyer observed while on the Court of Appeals for the First Circuit:

> The harm at stake in a NEPA violation is a harm to the environment, not merely to a legalistic "procedure[.]" The way that harm arises may well have to do with the psychology of decisionmakers, and perhaps a more deeply rooted human psychological instinct not to tear down projects once they are built. But the risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation. The difficulty of stopping a bureaucratic steam roller, once started, still seems to us . . . a perfectly proper factor for a district court to take into account in assessing that risk[.]

Sierra Club v. Marsh, 872 F.2d 497, 503 (1st Cir. 1989). Florida Wildlife Federation v. United States Army Corps of Eng'rs, 404 F. Supp. 2d 1352, 1362 (S.D. Fla. 2005) ("[I]t cannot be denied that allowing substantial development of a project creates momentum that typically cannot be reversed."). It would be error for this Court to review this case without addressing the question of the fifty year plan.[179]

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[179]The Industry Defendants assert that it is not proper to litigate questions related to the longer mining plans, since those "[50 year] permits have not been proposed.]" Docket Entry #44, p. 21 n15. This seems a bit disingenuous since, in November 2001, a mining representative noted that "several companies are concerned that the issuance of the 10 year permits may prejudice existing permits to mine beyond the 10 year

The Corps itself has declared that the EIS and the originally envisioned permits were designed to facilitate the fifty year planning window for mining activities, even though the permits presently were being issued for a ten year period." AR682.[180] The Corps acknowledged that it rushed the publication of the EIS in June 2000, but that it did so in order to disclose information at the time that permit extension decisions were being made. In June 2001, the Corps noted that the key to the renewal of the ten year permits will be the monitoring plan used in year nine. AR836. The inclusion of the three year review point in these "bridging permits" apparently was designed to give the Corps a means by which to respond to the extensive objections that had been raised regarding the initial mitigation plans, and to determine what Miami-Dade County would do regarding potential contamination of its primary source of drinking water by mining activities. For example, the EPA had raised "serious wetland and drinking water ..." concerns, but supported the concept of a "bridging permit" to deal with the problem of the expiring permits. AR705A.

If these permits had been issued as fifty year permits, the Court would have invalidated the permits and directed the Corps to deny the permits (rather than simply remanding the case for further study). Such a conclusion would have been required under NEPA (and the CWA) because of the significant adverse effects and the Corps' insufficient mitigation and other analyses.

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footprints .... [and] proposed 'savings' language to be inserted at the end of the first special condition discussing the relationship between the 10 year permits and the 50 year Lakebelt program." AR899.

[180]"While the Public Notice described 50-year permits ..., currently the parties are exploring what is being called a 'bridging permit' for 10 years but with a review at 3 years." AR718.

4. Relationship between short-term uses of environment and maintenance and enhancement of long-term productivity

The Court now turns to an evaluation of the adequacy of the Corps' balancing under NEPA of the applicant's need to use the environment against the enhancement of the environment's long-term productivity. Factors relevant to the Corps' consideration included conservation, economics, aesthetics, general environmental concerns, wetlands, historic and cultural resources, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership. AR1028 at 76-83. The Corps' weighing of the relevant factors need not result in a specific dollar and cents comparison[181], particularly in a case such as the present which involves extensive environmental destruction in order to obtain natural resource materials for sale by private corporations.

> The decisionmaker's task nevertheless remains the same. It is not to total up dollars and cents in a sort of profit-loss ledger, but rather to consider the previously unconsidered by giving weight and consideration to the ecological costs to future generations in deciding whether present economic benefits indicate that the depletion of irreplaceable natural resources should proceed in the manner suggested, or at all.

Sierra Club v. Morton, 510 F. 2d 813, 827 (5th Cir. 1975). The scope of the Corps' evaluation of each of the relevant factors must be similar. "[T]he record shows that the Corps' analysis, while narrowing the review of the proposed project's impacts to the 535-

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[181]"NEPA does not mandate the inclusion of a cost-benefit analysis in an environmental impact statement." Mooreforce, Inc.v. U. S. Dept. of Transp., 243 F. Supp. 2d 425, 437 (M.D. N.C. 2003) (highway project cost-effectiveness analysis properly considered cost of induced travel and costs of intersections -- not a violation of NEPA, brought by owners of land that would be impacted by construction of road).

acre project, improperly extended the scope of both its benefits and alternatives analysis to the entire Research Park Project." Florida Wildlife Federation v. U. S. Army Corps of Engineers, 401 F. Supp. 2d 1298, 1331 (S.D. Fla. 2005) (failure to consider impacts of planned road extension related to development of Palm Beach County Biotechnology Research Park was arbitrary and capricious when record revealed reasonably foreseeable indirect and cumulative effects of the proposed project, and scope of alternatives and benefits analysis differed from scope of impact analysis).

The short term uses in this case are the mining, which results in the permanent removal of the wetlands.[182] "The most significant impact of Lake Belt mining is the production of goods, primarily building materials, for a growing Florida," AR1028 at 77[183]; thus, the long-term productivity is primarily as to an economic factor, e.g., production of limestone which supports economic growth, although the fees collected will be used to acquire property and fund restoration of the greater Everglades for the public benefit. The Corps' analysis focused primarily on the economic benefits of rockmining, using rapid development and growth in Florida to justify the expansion of mining, for profit, in the Lake Belt wetlands. "The adverse effect of urban sprawl in the local area and region should be investigated, for if rockmining is credited for supporting growth, it follows that rockmining should also be criticized for the adverse effects of growth, including the loss of open space,

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[182]The ROD states that "the public will enjoy the benefits of the construction material obtained at the expense of approximately 8 square miles of poor quality wetland, but in addition would benefit from the acquisition and restoration of 14.6 square miles of privately owned lands." AR1028 at 77.

[183]"[M]iners have financial based expectations to continue mining in the Lake Belt area." AR1028 at 83.

agricultural lands, and habitat." AR631/FAR85. It must be remembered that, at least for the purposes of the Corps' NEPA analysis, environmental impacts are more important than economic ones, economic and social impacts have lesser importance than purely environmental or ecological impacts. At least one court has reversed a permit denial based upon the Corps' improper focus on the potential harm to the economy of a neighboring area if a mall was to be constructed. Mall Properties, Inc. v. Marsh, 672 F. Supp. 561 (D. Mass. 1987), appeal dismissed at 841 F.2d 440 (1st Cir. 1988) (Corps should have focused its consideration on physical impacts).[184] The court's decision in Mall Properties seems to suggest that the Corps' economic inquiry should be confined to the effects related to alterations of the physical environment. "These effects would typically be with respect to navigation or fisheries." Id. An overemphasis on economic factors, particularly when they have not been tested rigorously, can derail the Corps' analysis. South Louisiana Environmental Council, Inc. v. Sand, 629 F.2d 1005 (5th Cir. 1980); see also Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437 (4th Cir. 1996) (inflated estimate of recreation benefits versus adverse environmental effects).

The socio-economic analysis in this EIS is scant, and the single report on this factor appended to the EIS relies on data derived only from the mining industry (apparently from

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[184]After that decision, the Corps issued a Regulatory Guidance Letter ("RGL"), 88-11 (effective August 22, 1988, expired December 31, 1990), *reprinted in* William L. Want, Law of Wetlands Regulation (2005), clarifying that the Corps staff "should give less weight to impacts that are, at best, weakly related to the purpose of our permit action and statutory authority, and not let such impacts be the sole or most important basis for a permit denial." William L. Want, Law of Wetlands Regulation §6:32, at 6-32 (2005).

the specific permit applicants themselves).[185] Misleading information about economic impacts can defeat the "hard look" function of an EIS. South Louisiana Environmental Council v. Sand, 629 F.2d 1005 (5th Cir. 1980); see also Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437 (4th Cir. 1996) (inflated estimate of recreation benefits weighed against adverse environmental effects). For economic impact, the Corps' scope of analysis included the "county and southeast Florida region," AR1028 at 8. The Corps' asserted that the need for the project was "demonstrated by the strong support of the state government and the local community for the jobs that will be created and the materials that will be made available for infrastructure improvements." AR1028 at 83. While the role of a state government and its support for a project may be somewhat relevant, it is not one of the factors specifically identified by Congress. Hoosier Environmental Council, Inc. v. U. S. Army Corps of Engineers, 105 F. Supp. 2d 953 (S.D. Ind. 2000) (Corps may give deference to decisions of a state agency regarding the purpose of a project sponsored by that agency); Friends of the Earth, Inc. v. U. S. Army Corps of Engineers, 109 F. Supp. 2d 30 (D.D.C. 2000) (state court's analysis irrelevant). One of the mining consultants argued that the Conference Report from the 1996 WRDA, 104th Congress, 2nd Session, Report 104-843 (September 25, 1996), directed the Corps to approve mining in the Lake Belt. AR474 at 5. "[T]he Legislature of the State of Florida has recognized the importance of the Lake Belt Area of Dade County for the provision of a long-term domestic supply of aggregates, cement, and road base material. The Secretary

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[185]"The methodology employed was to distribute a written questionnaire to Lake Belt mining interests that constitute approximately 90% of mining and related activities within the Lake Belt." AR614 at 871.

is directed to take into consideration the Lake Belt and its objectives, as defined by the State legislature, during development of the Comprehensive Plan [for Everglades Restoration]." AR605 at 195. This quote clearly refers to the overall CERP, and not particularly to the permitting decision before the Corps (and the Court).

While a permit applicant is permitted to pay for studies to provide information for an EIS, there are some restrictions on their role. See Regulatory Guidance Letter No. 87-5 (May 28, 1987) "Environmental Impact Statement (EIS) Costs that Can Be Paid by the Applicant, *reprinted in* Margaret N. Strand, Wetlands Deskbook (2d ed. 1997). Whenever possible, the Corps should seek independent verification of an applicant's information.

> Where the major federal action under consideration, once authorized, cannot be modified or changed, it may be essential to obtain such information as is available, speculative or not, for whatever it may be worth in deciding whether to make the crystallized commitment .... But where a multistage project can be modified or changed in the future to minimize or eliminate environmental hazards disclosed as the result of information that will not become available until the future, and the Government reserves the power to make such a modification or change after the information is available and incorporated in a further EIS, it cannot be said that deferment violates the 'rule of reason.' Indeed, in considering a project of such flexibility, it might be both unwise and unfair not to postpone the decision regarding the next stage until more accurate data is at hand.

Suffolk County v. Secretary of the Interior, 562 F.2d 1368, 1378 (2d Cir. 1977). "Courts allow the use of information by the private applicant, but require that the Corps exercise overall responsibility, and where the information is credibly challenged as inaccurate, impose a duty to investigate independently. Also, regulations of the Council on Environmental Quality express the intent of avoiding the use of a contractor with a conflict of interest." William L. Want, Law of Wetlands Regulation §6:60, at 6-54 (2005), (Van Abbema v. Fornell, 807 F.2d 633, 642 (7th Cir. 1986); Sierra Club v. Sigler, 695 F.2d 957 (5th Cir. 1983), Sierra Club v. Marsh, 701 F. Supp. 886, 912 (D. Me. 1988).

As to this weighing exercise, the pressure from the permit applicants, including the specter of the takings litigation[186], was damaging. Moreover, the reliance by the Corps upon applicant-supplied reports (e.g., Biological Assessment, Analysis of Practicable Alternatives, etc.) must be subjected to special scrutiny.[187] Paul Larsen's December 1999 report, Appendix I to the EIS, is cited extensively, *infra*, regarding its analysis of practicable alternatives.[188] Indeed, the Corps based its entire CWA alternatives analysis on that report.

The industry, or at least these mining companies, probably will suffer significant losses in the event that these permits are revoked, nevertheless, these losses cannot be justification for the possible, even probable, deleterious environmental effects caused by

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[186]"We also recognize the Corps [sic] concerns about becoming involved in lawsuits regarding inverse condemnation or takings and meeting the September 2000 deadline established in the state legislation for the issuance of at least one permit under the mitigation fee plan." AR712 (correspondence from the Office of the Secretary of the Department of the Interior to the Corps' District Commander).

[187]In February 1996, Larsen was accused of providing "very biased" information. AR270. In November 1997, NPS staff noted that they would like to have someone impartial review Paul Larsen's fiscal analysis. AR529.

[188]Paul Larsen also played a key role in the Florida Rock takings litigation. Then Chief Judge Alex Kozinski of the United States Claims Court stated: "Defendant argues that the time spent by Mr. Larsen (1000 hours [at a total fee of $84,876.45) was excessive. The court disagrees. Mr. Larsen contributed significantly to plaintiff's development of its case by presenting various visual aids describing the property and its surroundings. It was quite clear that plaintiff's counsel relied heavily on Mr. Larsen and that Mr. Larsen's participation at trial was essential to plaintiff's presentation. The court cannot disagree with counsel's decision to rely on Mr. Larsen in this manner and, in light of that participation (much of it observed by the court), the claimed fee does not appear excessive." Fla. Rock Industries, Inc. v. United States, 9 Cl. Ct. 285 (1985) (reducing Florida Rock's fee demand by 15% and denying requested enhancement, but approving 1000 hours of Larsen's time). The Court reduced lead counsel's hours to a total of 1,098.8 hours, and second chair counsel's hours were reduced to a total of 1,199.4 hours, in comparison to Larsen's 1000 hours.

this mining.[189] "'[W]e will engage in a "narrowly focused" review of the economic assumptions underlying a project to determine whether the economic assumptions "were so distorted as to impair fair consideration" of the project's adverse environmental effects.'" Mooreforce, Inc.v. U. S. Dept. of Transp., 243 F. Supp. 2d 425, 437 (M.D. N.C. 2003) quoting Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 446 (4th Cir. 1996), quoting South Louisiana Environmental Council v. Sand, 629 F.2d 1005, 1011 (5th Cir. 1980).

The Court previously described the takings litigation involving one of the mining companies, which was occurring while these permit applications were being reviewed. The

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[189]The EIS contains a discussion of land use restrictions, AR614 at 58, see also AR614, Appendix E. The industry maintains that its purchase and use/development of the Lake Belt area has prevented further urban expansion of Miami-Dade County. "[I]f mining interests had not purchased most of this land in the 1950's and 1960's ... present land use in the Lake Belt Area would probably look like Broward County immediately to the north where the Everglades has been transformed into drained urban subdivisions," AR257 at 5 (Paul Larsen, January 16, 1996, correspondence to Corps); "If the Lake Belt Plan is not implemented the most likely scenario is that the resulting uncertainty would lead to the urbanization of the Lake Belt Area just like Broward County immediately to the north," AR610 at 11; "But for the fact that the mining industry purchased huge tracts of land as mining reserves in the Lake Belt area more than 25 years ago, residential and industrial development in Dade County would probably look similar to Broward County and there would be vastly fewer options and flexibility in the Lake Belt than is now the case." AR474 (Paul Larsen, May 23, 1997). These arguments ring hollow, however, as there is no indication that the area would succumb to sprawling development simply because rock mining was prohibited, nor is there any record evidence that Miami-Dade County desires to change the zoning of the Lake Belt area to permit urban development. Indeed, quite the opposite probably would occur – the mining industry already has telegraphed its willingness to pursue takings litigation in the event that mining permits are denied, if such litigation were to be successful (and there is sufficient reason to doubt that it would), it may lead to the forced purchase of the property by the government, which then would be able to restrict development of the Lake Belt and perhaps restore the wetlands. Indeed, it is by no means a settled question that rock quarries and potentially contaminated drinking water are preferable to the "drained urban subdivisions" in western Broward, for at least the subdivisions provide housing for the burgeoning population.

record suggests that the consideration of the Florida Rock case did influence the Corps' weighing, as acknowledged by the Corps, AR1028 at 37,[190] and the Court has determined that this influence resulted in a failure to consider important aspects of the problem and tempted the Corps to rely on factors other than those that Congress intended the agency to consider. Sierra Club at 1216. The Court has studied the Florida Rock line of cases, and finds that they rest on a thin reed. Unfortunately, that thin reed created a costly specter of expensive land acquisition or takings litigation which may have spurred on the destruction of hundreds of acres of wetlands unnecessarily. The Federal Circuit itself noted that the location of the Florida Rock property at issue in the takings case lended some plausibility to the Government's suggestion that willing buyers existed for the property despite the regulations, and that the company had not demonstrated a taking of all economic uses of its property. It should not be presumed that the mining companies would succeed in any future takings challenges, particularly as to any property acquired after passage of the CWA.[191] More pertinently, even the appellate panel in the Florida Rock decision recognized that South Florida's history of real estate speculation and rapidly expanding population-driven development might indicate a value in the acres that could

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[190]Note also that the first appellate decision in the Florida Rock litigation, in 1986, was being circulated within the Corps immediately after it was issued. AR9, AR10.

[191]Indeed, the Federal Circuit has distanced itself from the 1986 ruling in Florida Rock, noting that "[a]ny broad rule that may be drawn from these cases simply does not survive more recent Supreme Court precedent that indicates that 'defining the property interest taken in terms of the very regulation being challenged is circular.'" Sartori v. United States, 67 Fed. Cl. 263, 273 (2005), citing Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 331 (2002). The Federal Circuit observed that the Florida Rock panel's "[f]ocusing on the three-year time frame [i.e., the 98 acres sough to be mined originally] may have rendered less speculative the nature of the alleged injury." 67 Fed. Cl. at 274.

not, at the time, be mined. "South Florida has long enjoyed renown as not only a place where the gullible are fleeced, but also one where far-seeing investors realize fortunes." Florida Rock v. United States, 791 F.2d at 902 (1986).[192]

While the scope of this Court's review is narrow, it is not without dimension. Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1576 (10th Cir. 1994). "[T]he public will need to review the total costs (ecological, economic, and social) of its current usages of rock products. Will it be willing to accept the accelerating costs or will it look for alternatives, alternative materials for road or building construction and/or more extensive recycling? Ultimately, the public's need for the rock product will have to change and private industry will react, but it is not the role of the Corps to dictate to the public or to manage the State's economy." AR1028 at 39. As the Court cannot say that the Corps' balancing was conducted according to NEPA, particularly in light of the Corps' reliance on reports that should have been subjected to independent verification, remand is necessary.

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[192]Despite the Claims Court's determination to find a nearly total taking as to Florida Rock's property (in defiance to the appellate court's direction to consider other bases for value that may have existed) that court did not find a taking as to a 1,247 acre parcel adjacent to the lands at issue in the Florida Rock litigation and for which permits were being sought during the same time period. City Nat'l Bank of Miami v. United States, 33 Cl. Ct. 224 (1995). The owner of those lands, Lloyd Moriber, proposed to mine 655 acres of his property, which had been acquired in 1972. Although he was informed by the Corps in 1976 that a permit would be required for his ongoing mining, Moriber didn't pursue an appeal, but instead waited on the outcome of the Florida Rock litigation and then at some time in 1990 or 1991 "contacted counsel for the Government to discuss the possibility of settlement." City National Bank of Miami v. United States, 30 Cl. Ct. 715, 717 n3 (1994). After the Government refused to settle, Moriber resubmitted a permit application, which the Corps denied on March 8, 1993. A change in local regulations in 1988 had resulted in a designation of Moriber's property as subject to environmental protection, and he was unable to demonstrate -- when he re-applied to the Corps -- that he would have obtained local permission to proceed with the mining; thus, there was "no diminution in the value of the property as of the date of the alleged taking attributable to actions of the Federal Government." 33 Cl. Ct. at 233.

5. Any irreversible and irretrievable commitments of resources which would be involved in the proposed action if implemented

The Corps must "'ensure[ ] that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.'" Sierra Club, at 1214, quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). It is undisputed that mining has serious adverse effects. Clearly, once the wetlands have been eliminated by mining, they are irretrievable. Although the mining companies will be constructing shelves around the lake to function as artificial wetlands,[193] the ecological value of the shelves and the quarry pits is low, as they differ significantly from any natural part of the Everglades landscape. Early in the process of analyzing the Lake Belt Plan, in November 1995, the Florida Game and Fresh Water Fish Commission noted that the deep lakes don't function the same as shallow wetland systems, and that the destruction of limestone walls around the Aquifer is irreversible. AR242. In addition, the transmissivity of the Aquifer and its important role in South Florida render it particularly vulnerable to contamination. If the water must be treated to drinking water standards, the County will have to install new purification systems, and it is unclear what effects the contamination might have on the other aspects of the hydrological system.

6. Public participation

Meaningful public participation is a vital part of NEPA; "[a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40

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[193]A competing use would then be further development, particularly if the property remains in private hands.

C.F.R. 1500.1(b).[194] The CEQ regulations require that "[high quality] environmental information [be] available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. 1500.1(b). Public officials and members of the public have every right to expect that an EIS will contain a clearly written and concisely presented environmental analysis, rather than a compilation of hundreds of pages of reports from which quotations have been excerpted. For example, the EIS at issue herein contains 95 pages, accompanied by multiple annexes and appendices, for a total of approximately 1,000 pages; the section entitled Land Use, AR614 at 58, contains five pages of text essentially copied directly, i.e., without evaluation thereof, from Appendix E, a fifteen page "Lake Belt Land Use Report," AR614 at 805.[195] In contrast, the EIS contains just slightly more than one page, AR614 at 18, summarizing approximately one hundred pages of a Water Quality Evaluation prepared by EPA, Appendix B, AR164 at 266. A sample of the text follows:

> Total organic carbon was lower in borrow pit [i.e., mining quarries] samples than in canal and groundwater samples. Paired comparison of borrow pits and proximate canals [and proximate groundwater stations]] found total organic carbon as much as 10 mg/L lower in borrow pits than corresponding canal stations [and groundwater stations]..... The lower borrow pit levels may be a result of chemical and bacterial oxidation of the organic substances in the water and/or a result of absorption of carbonate and oxide precipitates.

AR614 at 29. It is unclear what conclusion a public official or member of the public, presumably neither of whom are trained water chemists, might draw from this information.

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[194]This requirement mirrors the public participation requirement of the CWA, discussed later in this opinion.

[195]Similarly, the EIS presents a ten-page section on vegetation, AR614 at 31, which copies text -- with little critical analysis thereof -- from a 23-page report, Appendix C, AR614 at 374, prepared by private consultants.

The CEQ regulations direct agencies to "incorporate material ... by reference when the effect will be to cut down on bulk without impeding agency and public review of the action." 40 C.F.R. 1502.21. The Corps' preparation of this EIS does not comply with this regulation, as the Corps either has included too much repetitive text with insufficient analysis or has abbreviated drastically such that the reader is unable to interpret the information.

The Corps also was at times unclear in the information that it made available to the public – particularly as to the extent of the mining being permitted. The Public Notice issued with the EIS in June 2000 reported that the mining impact area of 14,300 acres represented the "total extent of renewals and expansions" and that it included 5,900 acres already permitted. AR623A. According to the Memorandum for Record dated September 29, 2000, which addressed the expiring permits that were to be renewed as part of the fifty year mining plan, the permit extensions did "not change the extent or nature of work related to the originally authorized excavation or fill.... [and] only extend[ed] the timeframe in which to complete the mining activities." AR718. The Revised Public Notice issued in March 2001, which superseded the earlier Notice, is silent as to whether it includes any renewals, and it appears to address fewer acres (the total acres of impact is not included, but the sum of the requests from each mining company is 3,959.07) than what were allegedly "remaining to be mined but already permitted" (5,900 according to the first Public Notice). AR737. The Revised Notice also does not compare with what ultimately was permitted by the ROD, i.e., 5,409.32 acres – rendering it difficult, if not impossible, for the Court, or any member of the public, to discern a reasonable estimate of the number of acres being permitted by this action. This is just one example of the Corps' inattention to detail in the

few documents which it did make available to the public.

Further, after the EIS was distributed in June 2000, the Corps failed to provide important information to the public regarding the potential contamination of the municipal drinking water source and other issues before the Corps made the decision to issue the permits. For example, the EIS reports that: "[a]t this time, it has not been determined what is needed as a safe buffer to protect the water supply." AR614 at 70. The public was not provided any further information on protection of the wellfields prior to the ROD, and the ROD simply reports that certain actions were taken to "mininimize[ ] the potential for impact to the public health while the risk assessment and amendment of the [County's wellfield protection] ordinance are being reviewed." AR1028 at 55. Nor was the public given an opportunity to comment on the draft permit template or the ten special conditions placed on the permits. The existence of these items in the record is not enough to meet NEPA. "Because public disclosure is a central purpose of NEPA, an EIS that does not include all that is required by NEPA may not be cured by memoranda or reports that are included in the administrative record but are not incorporated into the EIS itself." Sierra Club v. Marsh, 976 F.2d 763, 770 (1st Cir. 1992) (EIS considered reasonably foreseeable impacts related to construction of marine cargo terminal and causeway to port facility).[196]

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[196]The Industry Defendants assert repeatedly that information "already was disclosed" to Plaintiffs, Reply Brief, Docket Entry #44, at 10, apparently suggesting that the Plaintiffs' participation in the Lake Belt Committee – which, again, did not include the Corps among its voting members – and in other non-Corps sponsored discussions of the EIS in some manner satisfies NEPA's public participation requirements. Clearly this position is untenable, for NEPA requires disclosure to the public, not just activist organizations such as Plaintiffs, of the specific information supporting the Corps' decision, including the specific decision documents issued by the Corps. The Corps cannot rely on other agencies to conduct public hearings on its behalf.

7. Coordination among agencies

The lead agency preparing the EIS has responsibility for ensuring the involvement of all other cooperating agencies. 40 C.F.R. 1501.6; Sierra Club v. United States Army Corps of Eng'rs, 295 F. 3d 1209, 1215 (11th Cir, 2002). The Corps was the lead agency here, but an early commitment was received from EPA and FWS that they would participate as cooperating agencies. The Corps' relationship with EPA with respect to the review of 404(b) permits is addressed in a Memorandum of Agreement between the agencies.

> The Corps will not evaluate applications as a project opponent or advocate – but instead will maintain an objective evaluation, fully considering all relevant factors. The Corps will fully consider EPA's comments ... and views when determining whether to issue the permit, to issue the permit with conditions and/or mitigation, or to deny the permit. It is recognized that the EPA has an important role [under] the Clean Water Act, National Environmental Policy Act, and other relevant statutes. When providing comments, only substantive, project-related information (within EPA's area of expertise and authority) on the impacts of activities being evaluated by the Corps and appropriate and practicable measures to mitigate adverse impacts will be submitted.[197]

Memorandum of Agreement Between Environmental Protection Agency and the Department of the Army, dated August 11, 1992, *reprinted in* Margaret N. Strand, Wetlands Deskbook (2d ed. 1997).

The relationship between the FWS and the Corps also is the subject of specific guidance. The Corps is directed to give great weight to FWS because it generally has

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[197]The 1992 Memorandum of Agreement between the EPA and the Department of the Army was adopted to minimize duplication of efforts by the two agencies, and consequent delays, when issuing permits under Section 404, particularly in light of the two agencies' parallel governing regulations. The MOA "does not diminish either Agency's authority to decide whether a particular individual permit should be granted." Memorandum of Agreement Between Environmental Protection Agency and the Department of the Army, dated August 11, 1992, *reprinted in* Margaret N. Strand, Wetlands Deskbook (2d ed. 1997).

more expertise in the area of mitigation. 16 U.S.C. 662(a), 33 C.F.R. 320.4. Moreover, the agencies are to "foster strong professional partnerships and cooperative working relationships." Memorandum of Agreement Between the Department of the Interior and the Department of the Army (December 21, 1992), *reprinted in* Margaret N. Strand, Wetlands Deskbook (2d ed. 1997).

Early in the permitting process, FWS announced that it did not have funding to conduct independent research, AR83, although its staff participated regularly in interagency meetings and discussions. At some point in 1997, Corps staff began showing their frustration with FWS staff. A Corps staff member wrote to an FWS staff member, asking that FWS specify its "precise" reservations regarding the 2.5:1 mitigation ratio and noting that EPA already had agreed to this number. In 2001, senior Corps staff responded to a site visit request from FWS by stating that "you [FWS] are really in a tough spot coming in after all the site visits." AR741; later that same year, Corps staff suggested that the District Engineer himself contact staff at EPA and FWS directly and remind them of their role with respect to Corps staff. AR931. More frustration is evident in the following statement. "This is so wasteful of our time, ... we have probably had fifteen FWS staff involved in this since the early 1990s." AR934. The expressed tension between these public servants is unfortunate, particularly in light of the challenges faced by each individual involved.

> As it is, a government policymaker is placed by NEPA in a difficult enough posture with respect to controversial federal programs. On the one hand, in response to public pressure to find means of satisfying our ever-increasing and widespread national energy needs, he is expected to originate and consider proposals for exploitation of our natural resources. On the other, he is obligated by NEPA to proceed with such proposals only when, in his honest judgment and after full detailed study and balancing of all relevant factors, he concludes that the project is

> worth the environmental cost. Although the task might be lightened by placing the burden of making the final decision elsewhere -- such a procedure conceivably could lead to more objective resolution of the conflict -- under present law it continues to rest on the same person's shoulders, undoubtedly in part because he and his subordinates are more familiar with all of the relevant facts and circumstances than anyone else in government.

Suffolk County v. Secretary of the Interior, 562 F.2d 1368, 1389 (2d Cir. 1977) (citations omitted) (offshore drilling program). The Corps' insistence that FWS agree to the Corps' conclusions, particularly as to an appropriate mitigation ratio, was a source of frustration for staff members of both agencies which was not resolved until FWS conceded to the ratio. While the Court would not remand this permit for the sole reason of the Corps' and FWS' apparent problems in coordination, it nevertheless would be more consistent with their regulatory duties if their cooperation was improved upon in the future.

In conclusion, the Court has determined that, according to NEPA, the EIS was not legally sufficient to support the decision to issue the permits and that this case must be remanded for at least five reasons: 1) the information contained in the EIS and its accompanying Public Notice was inaccurate, incomplete, and unclear; 2) the analysis of alternatives was insufficiently rigorous and therefore misleading; 3) methods for protecting the municipal water supply were neither identified nor established; 4) seepage impacts were not studied sufficiently nor mitigated for; and 5) the Corps failed to report, or even account for, the foreseeable loss of wood stork habitat. The present case seems to be an example of the very reason for which NEPA was enacted. Prior to the passage of NEPA, "the benefits of development were overstressed and less environmentally damaging alternatives for meeting program objectives were often given less consideration." Skinner, at 1540 (11th Cir. 1990).

B. APA

Having determined that the Corps violated NEPA, and because the standards are nearly identical, the Court similarly concludes that the Corps violated the APA, §706(2), for all of the reasons addressed above. As an additional basis, the Court determines that the Corps acted "without observance of procedure required by law," 5 U.S.C. §706(2)(D); see, e.g., Alamo Express, Inc. v. United States Interstate Commerce Commission, 613 F.2d 96 (5th Cir. 1980) (invalidating grant to carrier of right to transport products to international boundary as having been issued without notice and comment by other carriers, contrary to procedure outlined in controlling cases).

IV. DID THE CORPS VIOLATE NEPA OR THE APA BY FAILING TO ISSUE AN SEIS (COUNT V)

Plaintiffs allege that the Corps has compounded the aforementioned violations in the original EIS by failing to prepare a SEIS either in response to new information received before the Corps issued the ROD, or to address substantial changes made in the mining/permitting plan between when the EIS was issued in June 2000 and the date the ROD was issued in April 2002, and therefore has violated NEPA and section 706(2) of the APA. The Court's determination as to whether a violation of APA 706(2) occurred is guided by the analysis in the preceding section regarding NEPA violations in the original EIS (and also by the discussion, *infra*, of the Corps' violation of the CWA and the ESA in preparation of the ROD). Plaintiffs note that the Corps rejected demands for a SEIS made

by FWS (AR605, May 26, 1999),[198] EPA (AR713, FAR41, September 20, 2000), and Plaintiffs (AR963, January 25, 2002).

As previously discussed, NEPA ensures that environmental considerations are given proper deliberation throughout the decision making process. NEPA "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983). Although NEPA, 42 U.S.C. §4332(2)(c), itself doesn't explicitly require a SEIS, it has been read to include a SEIS as part of the "hard look"[199] required of an agency, but only if a "major Federal action" is yet to occur. Norton v. Southern Utah Wilderness Alliance, 124 S.Ct. 2373 (2004) (court can only compel agency to take a discrete action that it was required to take, evidence of increased use of off-road vehicles in federal lands did not trigger preparation of a supplemental EIS under NEPA, allowing use of off-road vehicles in wilderness study areas did not violate federal land management policies since there was no further federal action to take place). In the present case, of course, it is clear that a major federal action remained: issuance of the permits/ROD.

NEPA's implementing regulations for the Corps (33 C.F.R. 230.11(b)) and those

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[198]FWS made its request prior to publication of the Final EIS, but the majority of the agency's criticisms were not addressed by the Final EIS -- indeed, were unable to be addressed prior to June 2000 -- and, thus, remained pending.

[199]"An agency has met its 'hard look' requirement if it has 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a "rational connection between the facts found and the choice made."'" Sierra Club v. Corps, 295 F.3d 1209, 1216 (11th Cir. 2002), quoting Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

adopted by the Council on Environmental Quality (CEQ) (found at 40 C.F.R. 1502.9(c)(1)) provide, respectively, that an EIS must be supplemented "whenever significant impacts resulting from changes in the proposed plan or new significant impact information, criteria or circumstances relevant to environmental considerations impact on the [proposed plan]," or where the "agency makes substantial changes in the proposed action that are relevant to environmental concerns [or there are] significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." [200] In this case, there were both changes and new information which should have triggered an SEIS.

When changes to the proposed project are made, a supplemental EIS is required "if [the changes] will have a significant impact on the environment that has not previously been covered by the [original] EIS." National Wildlife Federation v. Marsh, 721 F.2d 767, 782 (11th Cir. 1983); Environmental Defense Fund v. Marsh, 651 F.2d 983 (5th Cir. Unit A 1981) (3.5% volume change in character of affected lands was not significant). In the present case, the Corps made several changes to the permit which were "substantial" and that had a significant impact on the environment: the authorization of mining as close as 1,000 feet east of the L-31N canal "if determined necessary for a public purpose;"[201] the agreement

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[200]For example, failing to consider cumulative impacts might be enough reason to require a SEIS. Oregon Natural Resources Council v. Marsh, 52 F.3d 1485 (9th Cir. 1995) (remand for additional SEIS as to failure to study cumulative impacts).

[201]Compare the EIS, AR614 at 99, to the ROD, AR1028 at 4, 53, 140. Also, compare AR614 at 90 ("mining of approximately 21,000 acres of wetlands at total project buildout will have an irreversible significant impact on the environmental resources of the region") to AR1028 at 113 ("this permit action will not have a significant impact on the quality of the human environment").

that mining was presumed to continue after the initial review rather than to requiring an affirmative renewal of the permits;[202] and the decision not to require transfer of mined lands or conservation easements as a condition of the permits.[203]

"If new information regarding endangered species [becomes] available, or if environmental consequences not already evaluated [come] to light, the Corps [is] required to prepare a ... SEIS." Sierra Club v. Army Corps of Engineers, 295 F.3d 1209, 1219-20 (11th Cir. 2002). The Corps' failure to discuss in the EIS the potentially adverse effects on the endangered wood stork, discussed in detail below,[204] was compounded by the Corps' failure to include the late-prepared BA in any NEPA document until the permits were issued.[205] The County's technical reports in August 2000 regarding the hydrology of the area, AR1175 and AR1176,[206] also constituted new information that was significant and relevant to the proposed project. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374, 385 (1989) (new information wasn't significant enough to require SEIS as to dam construction project). EPA asked for SEIS. An agency may determine that the

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[202]Compare the EIS, AR614 at 69-71, to the ROD, AR1028 at 73.

[203]Compare AR614 at 99 to AR1028 at 70.

[204]A senior Corps staff member noted that the Corps had no idea what design changes could be made if it was determined that there was an adverse effect on the wood stork. AR688 at 109.

[205]Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 444 (4th Cir. 1996) (remand for SEIS on dam project in view of substantial comments from EPA and FWS as to zebra mussel infestation that hadn't been seriously considered by Corps).

[206]The EIS states that the effects of groundwater seepage are "not immediate" and that because the "recommended plan is based on 50 years of mining [therefore] the total effect will not be seen until then." AR614 at 99. The ROD states that "there are groundwater seepage impacts." AR1028 at 52.

preparation of an Environmental Assessment (EA) is sufficient, instead of preparing a SEIS. The EA is the agency's decision on whether to prepare an SEIS/EIS or to issue a Finding of No Significant Impact (FONSI). 40 C.F.R. 1501.4. Here, the Corps' FONSI, AR1028 at 113, represents the agency's determination that supplementation is not necessary. In other words, the ROD includes the Corps' EA, which concludes that no SEIS/EIS is required.

The Federal Defendants argue that no SEIS was required and that the FONSI was justified, because the reduction from fifty years of mining envisioned in the EIS, to ten years as provided in the permits,[207] was a minimizing change that did not trigger the additional in-depth analysis of an SEIS, and the reduced period of mining satisfied the objectors' concerns Certainly, "[w]hen an agency implements a minimizing measure, it is not automatically required to redo the entire environmental analysis," but the Eleventh Circuit directs that even where post-EIS changes are entirely beneficial, "if they are significant, they require an SEIS." Sierra Club v. Army Corps of Engineers, 295 F.3d 1209, 1221-22 (11th Cir. 2002) (citing National Wildlife Federation v. Marsh, 721 F.2d 767, 782-83 (11th Cir.

[207]The Court previously has observed that the administrative record reveals the Corps' (and the mining industry's) intention of renewing these permits to a total of 50 years. See, for example, the discussion above regarding "bridging permits."

1983)).[208] The timing of the EA is relevant.[209]

EPA recommended that the Corps prepare a supplemental EIS to address "all of the currently unresolved fundamental environmental issues.... this proposal is so protracted (50) years) and the wetland impacts are so unprecedented ... EPA continues to have serious reservation [sic] about the water supply impacts of the proposed Lakebelt mining activities on the Northwest Well Field ...." AR713. Frustration was experienced by all parties. As previously noted, a senior Corps staff member expressed concern in July 2001 that the mining consortium might "collapse" and that the Corps' workload would surely increase as a result. AR 843.[210] There are several indications in the record that the requests for the

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[208]The appellate panel in Sierra Club noted that other circuits have questioned the Circuit's earlier decision in Marsh, and that the more rigorous EAs now required may serve as a limit on the holding of Marsh. "EAs are now generally considered 'thorough enough to permit a higher threshold for requiring environmental impact statements.'" Sierra Club, 295 F.3d at 1222 fn17 (noting that early Fifth Circuit cases that directed Eleventh Circuit precedent dealt with EAs that since have become more stringent)(quoting River Road Alliance, Inc. v. U. S. Army Corps of Engineers, 764 F.2d 445, 451 (7th Cir. 1985)).

[209]This case is distinguishable from Fund for Animals, Inc. v. Rice, 85 F.3d 535 (11th Cir. 1996) for at least two reasons. The Corps had conducted and EA after receiving permit applications, and then received not just one but several BOs. (Corps not arbitrary or capricious in determination that an EIS was not required for decision to locate landfill in wetlands where no upland site was available. The EA had been completed in 1994, four years after notice of the permit application, and after FWS issued a Biological Opinion which consented to the project. In response to objections received from EPA, the applicant reduced the requested impact on wetlands; also, further consultation with FWS resulted in the preparation of two additional Biological Opinions). Contrast that case with the present one, in which the EIS was issued in 2000, with no update, and prior to the receipt of multiple substantial objections from FWS, EPA, local governmental agencies and others; moreover, no Biological Opinion was prepared before issuance of either the EIS or the EA. See, e.g., Fund for Animals, Inc. v. Rice, 85 F. 3d 535, 541 (11th Cir. 1996).

[210]According to the Corps, the Jacksonville District workload is approximately 8000 permit applications per year. Affidavit of John R. Hall, Chief of the Regulatory

Corps to prepare a SEIS fell on deaf ears.[211] The Corps clearly was concerned, as discussed earlier, about keeping the permitting process on track in order to keep the $.05 per ton fee and to avoid additional inverse condemnation actions. After the Florida Rock takings litigation settled, in 2001,[212] the Corps was free to stop rushing. The Corps had extended the permits through January 31, 2002, AR931, However, they said -- perhaps in light of the Florida Rock settlement -- that the new permit decisions "should not be further delayed for further studies." AR1028 at 112. When the EPA finally withdrew its objections in February 2002 (FWS already had withdrawn its objections in December 2001[213]), there was little remaining impediment to the Corps' granting of the permits.

The Court already has concluded that the original EIS was so lacking that it must be remanded to the Corps for further development, which renders the question of supplementation largely irrelevant. Nevertheless, the Court hereby concludes that, based upon the EIS as published, the changes which occurred subsequent to its publication, and

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Division of Jacksonville District, Corps, Nov. 15, 2002 (Docket Entry #2, Federal Defendants' Reply brief re: motion to transfer, Exhibit 1).

[211]Prior to issuing the EIS, the Corps had been urged to await the completion of the Phase II plan, but that Plan was delayed and was inadequate. Announcing that "[t]he decisions on renewals and new mining permits have been delayed long enough, therefore the EIS will be finalized so that the information in it can be used in the decisions," the Corps responded to its critics and stated that it could not commit to a SEIS because it could not "predict future funding authority" nor could it "predict how extensive the changes will be in the Phase II Master Plan that would warrant a supplement." AR586.

[212]The Court was unable to locate a specific date of the Florida Rock settlement.

[213]FWS based its decision to concur with the Corps on a Biological Assessment provided by mining consultants; that document was not prepared until April 2001, and thus was not included with the EIS.

the new information, e.g., with respect to the wood stork, that a SEIS should have been prepared and the Corps violated NEPA and the APA by failing to do so. The Corps is directed, on remand, to prepare an EIS which comports with NEPA.[214]

V. DID THE CORPS' ISSUANCE OF THE PERMITS COMPLY WITH THE CWA AND THE APA 706(2)? (COUNT I)

Plaintiffs allege that the Corps violated the CWA and APA §706(2) by issuing the mining permits without conducting a public hearing or providing adequate public notice. Plaintiffs also argue that the Corps failed to explain the loss of wetland functions attributable to each mining permit, and failed to provide a sufficiently complete mitigation plan, or to explain how the project would avoid harmful effects on wildlife and water quality. In addition, Plaintiffs attack the preparation of the EIS, as well as the ROD, under the CWA -- asserting that the Corps did not adequately develop and analyze alternatives to the proposed mining, and failed to evaluate all the direct, indirect and cumulative impacts.

A. The CWA and its implementing regulations

The CWA prohibits the discharge of any pollutants into "navigable waters," 33 U.S.C. §1311(a), defined as "waters of the United States." 33 U.S.C. §1362(7). The law has developed to include certain wetlands within this definition, as they "may function as integral parts of the aquatic environment." U. S. v. Riverside Bayview Homes, Inc., 474 U.S. 121,

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[214]If the information recently presented to the Corps, in February 2004, had been provided prior to the Corps' decision to issue the permits (and after issuance of the EIS), the Court very likely would have been compelled to find that the failure to prepare a SEIS violated NEPA.

135, 139 (1985) (Corps had jurisdiction over wetlands that abut a navigable waterway).[215] It is undisputed that the wetlands at issue herein qualify as "waters of the United States," and the mining activities result in the discharge of "pollutants," consistent with the definitions of these terms found in the CWA's implementing regulations. 33 C.F.R. 323.2, 33 C.F.R. 328.3, 40 C.F.R. 230.3.[216] Congress has provided, however, for certain discharges of pollutants to occur and has specified, in Section 404 of the CWA, the exacting conditions under which (dredge and fill) permits may be issued to allow for the otherwise illegal discharge of pollutants. 33 U.S.C. §1344. Guidelines to limit such discharges have been developed by EPA under Section 404(b)(1), i.e., 33 U.S.C. §1344(b)(1), and are found at 40 C.F.R. Part 230.[217]

The Corps makes both individual and general permit[218] decisions, and the EPA

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[215]33 C.F.R. 328.3(a), adopted in 1986, specifically defines wetlands "adjacent to waters [of the United States]" as being within the CWA's protection. "Wetlands" are defined as "areas that are inundated or saturated by surface or ground water at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. 328.3(b).

[216]The term "pollutant" includes rock or sand discharged into water, 40 C.F.R. 230.3(o), or any "material that is excavated or dredged from" waters. 33 C.F.R. 323.2. Recall also that roads and workpads that are part of the mining also are considered "fill" in a wetland.

[217]The 404(b)(1) Guidelines, in final form, were promulgated by the Administrator of EPA and the Secretary of the Army on December 24, 1980. See Memorandum to the Field, "Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements," available at: http://www.usace.army.mil/inet/functions/cw/cecwo/reg/flexible.htm

[218]The limestone mining industry herein was seeking a "general permit" – which would have allowed mining to proceed without individualized review and based simply upon compliance with several conditions applicable generally within the region. The Corps originally intended to issue a General Permit, delegating its authority to DERM.

develops and interprets environmental criteria used in evaluating permit applications; EPA also reviews and comments on individual permit applications.[219] The EPA, as well as FWS, can elevate to a higher level review[220] specific cases pursuant to Section 404(q) of the CWA, but only "those cases that involve aquatic resources of national importance."[221]

AR468. The Corps may issue a general permit for "categories of activities" on a state, regional, or nationwide basis, 33 U.S.C. §1344(a), (e), when they are substantially similar in nature and "cause only minimal individual and cumulative [adverse] environmental impacts" or when it would avoid unnecessary duplication of the regulatory authority exercised by another Federal, state or local agency -- provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. 33 CFR 322.2(f).

[219]The Senate bill which later became Section 404 of the CWA originally gave EPA the authority to administer the Section 404 permits, but after a compromise with the House of Representatives, the resulting legislation gave that authority to the Corps, subject to oversight by EPA. Senator Muskie was concerned that the Corps might not be as protective as the EPA. "The Corps of Engineers, a mission-oriented agency, is not equipped to evaluate the environmental impact of these dredging activities.... [M]ission-oriented agencies whose mission is something other than concern for the environment simply do not adequately protect environmental values. That is not their mission. They would do a disservice to their mission if they would try to act as environmental protectors. The mission of the Corps of Engineers is to protect navigation. Its mission is not to protect the environment." 117 Cong. Rec. 38854 (1971) (statement of Sen. Muskie, during Senate Consideration and Passage of S. 2770)."

[220]One FWS staff member recommended, in an intra-agency email message, that elevation be sought. "Although this may cause a scream, I think that a 404(q) [elevation] should be issued for this permit in order to once and for all bring the Pensucco wetland program into a controlled and equalized protocol." FAR57 (July 20, 2000). That staff member noted that the determination that there would be "no effect" on protected species was incorrect; "how can the loss of 14,300 acres of emergent sawgrass marsh to the South Florida Everglades not impact the foraging of wood storks." Id.

[221]According to the FWS website, www.fws.gov/habitatconservation/elevations.htm, there have been only sixteen cases in which the Department of the Interior has requested elevation to the Department of the Army.

Before a case or an issue is "elevated" there must be attempts to resolve the environmental concerns at the field office level, then at the Regional level, and finally at the national level – with the final decision resting with the Assistant Secretary of the Army for Civil Works.[222]

The statute, i.e., the CWA, itself imposes several obligations. Public participation "shall be provided for, encouraged, and assisted" in enforcing the CWA's standards, 33 U.S.C. §1251(e), 33 U.S.C. §1344(o)[223], and permit decisions must include analysis of "unacceptable adverse effect[s]" on municipal water supplies, wildlife or recreational areas, 33 U.S.C. §1344(c). Additional requirements are found in the CWA's implementing regulations, which have been promulgated both by the EPA, 40 C.F.R. Part 230, and by the Corps, 33 C.F.R. Parts 320 - 329. The Corps' CWA regulations expressly incorporate the regulations promulgated by the EPA to implement the CWA. See e.g., 33 C.F.R. 320.4(b)(4), 33 C.F.R. 325.2(a)(6); thus, the Corps must ensure that the permitted activity is consistent with the 404(b)(1) Guidelines.

The CWA's regulations prohibit the issuance of a permit in this case if: 1) an environmentally preferable and practicable alternative exists; or 2) the proposed mining activity will cause or contribute to significant degradation of the subject wetlands --

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[222]A 1992 Memorandum of Agreement between the EPA and the Department of the Army was adopted to minimize duplication of efforts by the two agencies, and consequent delays, when issuing permits under Section 404. The MOA "does not diminish either Agency's authority to decide whether a particular individual permit should be granted ...." Memorandum of Agreement Between Environmental Protection Agency and the Department of the Army, dated August 11, 1992, *reprinted in* Margaret N. Strand, Wetlands Deskbook (2d ed. 1997).

[223]There is a requirement of an "opportunity for public hearings," 33 U.S.C. 1344(a), but the relevant regulations provide the Corps with the discretion not to hold a hearing if there is "no valid interest to be served by a hearing." 33 C.F.R. 327.4(b).

measured by significantly adverse effects on municipal water supplies, wildlife and wildlife habitat, or aesthetic values, etc.; or 3) potential adverse impacts are not minimized through appropriate and practical steps. 40 C.F.R. 230.10.

B. Analysis of practicable alternatives

The 404(b)(1) Guidelines prohibit the "discharge of dredged or fill material ... 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." 40 C.F.R. 230.10(a).[224] 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)(2). The fundamental principle behind the CWA's "practicable alternatives" test is that industry and private developers should first seek project sites that will have the least damaging effects on wetlands and their ecosystems, and only when no such sites exist should development of wetlands be considered as an option, subject, of course, to obtaining the necessary permits. The Corps clearly violates the CWA regulations, and therefore its conduct is arbitrary and capricious,[225] when it permits a developer to obtain a permit on his chosen site because that site is the "most practicable" or "most profitable," if development of that site will result in greater environmental damage than would be realized at another available

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[224]The Corps' own regulations also require that it take into account practicable alternative locations and methods for accomplishing the project's objective. 33 C.F.R. 320.4(a)(2)(ii).

[225]The Corps' own regulations incorporate the 404(b)(1) Guidelines, 40 C.F.R. 230.10, and a violation thereof renders the Corps' conduct arbitrary and capricious.

site.[226]

Clearly, the Corps must have a firm grasp on exactly what is the "overall project purpose" in order to commence its analysis whether there are practicable alternatives. Understanding the purpose of a project also is key to a determination of whether the proposed activity "does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not 'water dependent')." If the activity does not require that water-based location, then there is a rebuttable presumption that there are practicable and environmentally preferable alternatives, 40 C.F.R. 230.10(a)(3), and such alternatives are presumed to have less adverse impact unless "clearly demonstrated" otherwise.[227]

The burden of demonstrating that no practicable alternative exists is the sole responsibility of the applicant, not the Corps' nor the other federal agencies. It is intended that 'this presumption should have the effect of forcing a hard look at the feasibility of using environmentally preferable sites' to discourage avoidable discharges in special aquatic

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[226]As described in Bersani v. Robichaud, 850 F.2d 36, 44 (2d Cir. 1988) (upholding EPA denial of permit for shopping mall development where alternative environmentally preferable site had been available when proposed site was purchased), if a developer has little incentive to search for alternatives, especially if she is confident that alternatives would soon become unavailable, then the regulation -- which is designed to provide an incentive to avoid choosing wetlands -- would be turned on its head.

[227]In 1993, the Corps issued Regulatory Guidance Letter ("RGL") 93-2, *reprinted in* William L. Want, Law of Wetlands Regulation (2005), which suggested that -- as to the evaluation of alternatives -- the extent of the analysis should be "commensurate with the severity of the environmental impact ... and the scope/cost of the project." While this RGL expired at the end of 1998, it is relevant to the Court's consideration because the Corps was reviewing the mining permits between August 1993 and December 1998, i.e., while RGL 93-2 was in effect.

sites, including wetlands." Review and Findings, Old Cutler Bay Permit 404(q) Elevation (September 13, 1990) at page 5, quoting from Preamble to 404(b)(1) Guidelines, 45 Fed. Reg. 85336 (1980), *reprinted in* Margaret N. Strand, Wetlands Deskbook (2d ed. 1997).[228] The Court's earlier discussion of the alternatives analysis required by NEPA, particularly as to the definition of project purpose, is incorporated herein.

1. The project's purpose

A competent analysis of alternatives depends upon a clear and accurate statement of the project's purpose, for it is only when the project's statement of purpose is "reasonably defined that the alternatives analysis required by the Guidelines can be usefully undertaken by the applicant and evaluated by the Corps." Old Cutler Bay, Oct. 9, 1990, at 6 (stated purpose to "construct an upscale residential/(Jack Nicklaus-designed) championship golf course community in south Dade County. The project's basis purpose is to realize a reasonable profit by providing luxury country club type housing to an affluent segment of the Miami area population ... 428 units" was rejected as too specific, acceptable statement

[228]The same Corps district involved in the Old Cutler Bay decision, i.e., the Jacksonville District, made the decision under review by this Court. The decision in Old Cutler Bay was issued by the Corps' national Director of Civil Works and involved facts strikingly parallel to those at issue herein. The desired development included an area of infestation by an exotic plant species, the Brazilian Pepper; the developer intended to mitigate the wetlands destruction by constructing littoral zones around lakes that would remain after the housing development was completed and by restoring off-site wetlands; the project size and impact were reduced as a result of interagency coordination; and the Corps had relied primarily on the applicant's own supplied data to evaluate the viability of practicable alternatives. While the Director did not disapprove of the mitigation plan or the final size and impact of the development he did find that the Corps needed to more clearly document the basis of its approval of the permits, particularly as to its evaluation of the applicant's alternatives analysis.

would have been "to construct a viable upscale residential community with an associated regulation golf course in the south Dade County area").[229]

There is little guidance in the CWA or its regulations as to what constitutes a "water-dependent" activity, nor does the definition of a project's purpose receive much attention at the statutory or regulatory level; however, this Court's review discovered an internal Corps' statement of standard operating procedures which is instructive.

> [D]efining the purpose of a project involves two determinations, the basic project purpose, and the overall project purpose.... The basic purpose of the project must be known to determine if a given project is 'water dependent.' For example, the purpose of a residential development is to provide housing for people. Houses do not have to be located in a special aquatic site to fulfill the basic purpose of the project, i.e., providing shelter. Therefore, a residential development is not water dependent.... Examples of water dependent projects include, but are not limited to, dams, marinas, mooring facilities, and docks. The basic purpose of these projects is to provide access to the water.

Army Corps of Engineers Standard Operating Procedures for the Regulatory Program (October 15, 1999), available at: www.saw.usace.army.mil/wetlands/Policies/SOPI.pdf ("SOP").[230]

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[229]Interestingly, the Corps' Director of Civil Works has issued a total of three decisions concerning application of the 404(b)(1) guidelines "practicable alternatives" test, including Old Cutler Bay, and in all three, the Director found that the District Engineer had incorrectly construed the guidelines too favorably to the landowner. William L. Want, Law of Wetlands Regulation §6:21, at 6-22.2 (2005). "[W]e have stated that great care must be used in determining the basic project purpose for purposes of the 404(b)(1) Guidelines alternatives analysis. We have also emphasized that Corps districts must use independent judgement in determining project purpose. The basic project purpose must not be so narrowly identified so as to unduly restrict a reasonable search for potential practicable alternatives." Old Cutler Bay at 13-14, referencing earlier decisions in section 404(q) elevations of the Plantation Landing Resort and Hartz Mountain Development Corporation cases.

[230]This statement appears on the website for an unrelated district of the Corps, but seems to be of general application; the Court cites it here solely for illustrative purposes, and does not suggest that it has the effect of regulatory guidance.

The basic project purpose should be "neither so broadly defined nor alternatively so narrowly defined so as [to] render the alternative analysis meaningless or impracticable. In both cases this would subvert the intent of the Guidelines." Old Cutler Bay at page 6. "The project purpose must be defined so that an applicant is not in the position to direct, or appear to direct, the outcome of the Corps evaluation required under the 404(b)(1) Guidelines." Id. at 7.[231] Although the regulations do not specify the source of the definition of a project's purpose,[232] "[d]efining the overall project purpose is the responsibility of the Corps, [and] the applicant's needs must be considered in the context of the desired geographic area of the development, and the type of project being proposed." SOP. The Corps (and the Court) can consider areas not owned by applicant. 40 C.F.R. 230.10(a)(2), "Districts should not focus too heavily on the specific profitability statements of the particular applicant before them." Old Cutler Bay, Oct. 9, 1990, at 9. "Although project 'viability' is one legitimate component of the concept of 'practicability' regarding any alternative being considered in the practicable alternatives review, that component is addressed in terms of the logistics, technical feasibility, and costs criteria in Section 230.10(a)(2) of the Guidelines." Id. at 12. Internal guidance to the Corps notes that "[t]he determination of

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[231]Similar to the example of a residential development discussed above, the permit applicants herein obviously would rather locate their mining on top of this attractive resource (e.g., the property is already owned, or presumably cheaper to acquire, contains a high quality rock product, and is located in proximity to existing infrastructure for processing the rock), but -- just as in the housing example – that does not mean that the essential mining activity requires siting in wetlands. Housing developers presumably would always choose to build on waterfront property, but that does not make the provision of housing a "water-dependent" activity.

[232]"The regulations do not answer the question whether the applicant, the Corps, EPA, or public commenters have the final word in defining the project purpose." Margaret N. Strand, Wetlands Deskbook 133 (2d ed. 1997).

what constitutes an unreasonable expense should generally consider whether the projected cost is substantially greater than the costs normally associated with the particular type of project." Memorandum to the Field, "Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements," available at: http://www.usace.army.mil/inet/functions/cw/cecwo/reg/flexible.htm ("Memo to Field").

As discussed above regarding NEPA, the Corps identified the purpose of the proposed mining project in the June 2000 Public Notice, and repeated it in the March 2001 Revised Public Notice, as: "Placement of fill related to excavation activities for the purpose of limestone quarrying." AR623A, AR737. The ROD specified that the "basic purpose" was "to extract limestone" and that the "overall project purpose is to provide construction-grade limestone from Miami-Dade County," AR1028 at 8.[233] In their briefs, the Federal Defendants argue that "[i]n this case, the proposed activity is the extraction of particular mineral resources located in particular wetlands .... [and that it] would be meaningless to state that this activity could be carried out elsewhere. Thus, the Corps properly did not apply a presumption that practicable alternatives were available." Federal Defendants' Reply, Docket Entry #42, at 16.[234] Compare the statement above to the Corps' assessment in another permitting dispute, less than one year after publication of the ROD at issue herein, involving one of the same mining companies, although in different wetlands (on the

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[233]"A conservation biology alternative [no additional mining, mandated restoration, etc.] will not achieve the landowners' purpose to provide a limestone product from the Lakebelt area." AR614 at 909.

[234]The Corps' conclusion that this project could not be carried out elsewhere should have placed additional focus on the consideration of on-site alternatives; instead, the ROD is silent as to the consideration of any such alternatives.

southwest coast of Florida), that the mining did not need to be located in a special aquatic site to fulfill its basic purpose of "develop[ing] a source for limerock." (See Plaintiffs' Notice of Filing, Docket Entry #48 at Exhibit 2, Corps' Statement of Findings regarding Florida Rock permit for mining, dated February 6, 2003).[235] Indeed, the court reviewing that permitting process remarked that "it is undisputed that this mining activity is not inherently water dependent." National Wildlife Federation v. Norton, 332 F. Supp. 2d 170, 186 fn13 (D.D.C. 2004) (applicant's objective is the proper focus). Common sense dictates that if mining (in wetlands) is not inherently water dependent in one situation, then it is not inherently water dependent in another.[236] The Corps' own internal directives provide additional illumination as to the concept of "site-specific." "Some projects may be so site-specific (e.g., erosion control, bridge replacement) that no offsite alternative could be practicable. In such cases the alternatives analysis may appropriately be limited to onsite options only." Memo to Field. Clearly, the replacement of a bridge must take place at the location of the former bridge; in contrast, the mining proposed herein need not occur in this specific wetland site.

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[235]Plaintiffs' notice of filing, Docket Entry #48, filed Oct. 15, 2004, included the underlying agency decision on Florida Rock's application to mine for limestone in Collier, Lee, Hendry, Glades, and Charlotte counties. The statement of purpose was to develop a source for limerock, and the mining was to impact 333 acres of wetlands (some of which was degraded by prior agricultural use). The Corps' decision document, dated February 6, 2003, specifically indicated that the activity did not need to be located in a special aquatic site to fulfill its basic purpose. Annex B of the EIS in the case presently under review contains a contrary determination. AR614 at 124-128.

[236]"A reasonable, common sense approach ... is fully consistent with sound environmental protection." RGL 93-2. Memorandum to the Field, "Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements," available at http://www.usace.army.mil/inet/functions/cw/cecwo/reg/flexible.htm.

2. Water-dependency

"[A] finding of water dependency is not a prerequisite to issuance of a section 404 permit, but only a factor to consider in the application process. Under this rationale, if the Corps incorrectly determined that [applicant's] fill activity was non-water dependent, reversal of the summary judgment would not be automatic." at 831. Friends of the Earth, Inc. v. Hintz, 800 F.2d 822, 835 (9th Cir. 1986) (upholding agency decision that a sorting yard for logs waiting to be exported was "water-dependent" under those specific circumstances, noting that Corps is not "a business consulting firm" required to affirmatively seek out alternatives, but that the Corps had "exhaustively studied" the information before making its decision). In Hintz, the Corps had engaged in a "reasonably thorough examination of the water dependency issue, and reached a rational conclusion." 800 F.2d 822, 831. Contrast that with the present situation, where the ROD was already being drafted before public comments on the EIS were received.

> All agencies agreed that log storage is not a water dependent use unless the storage is tied to an exporting facility. The agencies do recognize the need for an inventory of logs immediately adjacent to the ship loading facility and would consider log storage for this purpose as water dependent.... The applicant's log and lumber export operations require immediate proximity to navigable waters. The project site will serve as a log storage area for these operations. The expansion of the applicant's industrial complex, to include the project site, constitutes a water-dependent use of a special aquatic area.

Id. at 832. The court observed that "[s]torage of logs for domestic use is not water dependent, but efficiency dictates that the storage function not be divided, because logs are not initially segregated between domestic and export." Id. at 832 n10.[237]

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[237]It must be remembered that the CWA is a relatively new law (less than three decades), and decisions interpreting these water-dependency provisions are relatively young in terms of their tested precedential value.

It is undisputed by the parties that the Corps determined that the proposed mining in this case was water-dependent and, consequently, the Corps failed to apply the regulatory presumption to the applicants' proposed mining activity.[238] Because the Court finds that the record evidence compels the opposite conclusion, i.e., that the proposed mining activity does not require siting within wetlands in order to fulfill its basic purpose, i.e. to extract limestone,[239] the Corps was wrong to have ignored the presumption and remand is required.[240]

The regulations require that the Corps begin its analysis of a proposed project with the presumption that the "unnecessary alteration or destruction of [wetlands] should be discouraged as contrary to the public interest." 33 C.F.R. § 320.4(b) (1). This presumption is very strong. See 40 C.F.R. § 230.1(d) ("The guiding principle should be that degradation or destruction of special sites ["such as filling operations in wetlands"] may represent an irreversible loss of valuable aquatic resources"). To overcome it, an applicant must make three very difficult showings: first, that "the benefits of the proposed alteration outweigh the

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[238]"The activity needs to be located in a special aquatic site to fulfill its basic purpose." AR1028 at 59.

[239]AR1028 at 8.

[240]Indeed, the Court addresses this issue in some detail to clarify that an applicant's project purpose cannot be tailored so as to render the alternatives analysis circular, i.e., using a premise (limestone mining must take place on the miners' lands which happen to be wetlands) to prove a conclusion (the project requires siting within the wetlands) that is in turn used to prove the premise. To permit such circular reasoning would eviscerate the regulatory protections such that any activity, no matter how destructive – and it is difficult to conceive of something more destructive to wetlands than their complete removal by excavating down to 80 feet and leaving a hole in their place – could be justified on wetlands as long as that is where the applicant owned property.

damage[s]," second, that "the proposed activity is primarily dependent on being located in, or in close proximity to the aquatic environment," and third, that the proposed project cannot be located on any "feasible alternative sites." 33 C.F.R. § 320.4(b)(4). Wetlands can't be permitted to be destroyed simply because it is more convenient than not to do so. See 40 C.F.R. § 230.1(c). Congress and the agency have already determined that "wetlands are vital areas that constitute a productive and valuable public resource," 33 C.F.R. § 320.4(b)(1); see 33 U.S.C. § 1251 (1976). Buttrey v. United States, 690 F.2d 1170, 1180 (5th Cir. 1982)."[241]

3. Practicable alternative sources for rock

To determine whether a practicable alternative exists, the Corps engages in a sequential analysis. First, having determined that this activity is not water-dependent, it is presumed that a practicable alternative exists. Importantly, 40 CFR 230.10(a)(1), does not prohibit the Corps from determining that another wetlands site may be the "practicable

[241]Interestingly, Mr. Buttrey had sought (in 1978) to develop an area along the Gulf Coast, which would have affected a bayou that passed near Slidell, Louisiana. 690 F.2d at 1172-73. Objectors claimed that the dredge and fill would destroy natural drainage and increase the risk of flooding. The Court referenced that the relevant regulations suggested that destroying wetlands may increase the chances of local flooding. Id. at 1182. The Corps' denial of the permit, and the Fifth Circuit's approval of the procedures employed by the Corps (including the denial of a hearing for Mr. Buttrey), seem extremely wise in light of the lessons being learned after the devastation caused by Hurricane Katrina in August 2005. See, e.g., "substantial marsh loss ... potentially further reduces southeastern Louisiana's natural protection from future storms." "USGS Reports New Wetland Loss from Hurricane Katrina in Southeastern Louisiana," September 14, 2005, available at: http://www.usgs.gov/newsroom/article.asp?ID=997.

alternative" and may even be a less environmentally damaging alternative.[242] "For the purposes of this requirement, practicable alternatives include ... [d]ischarges of dredged or fill material into the waters of the United States or ocean waters." 40 C.F.R. 230.10(a)(1). The burden to rebut the presumption that an environmentally preferable alternative exists falls on the applicant. Buttrey v. United States, 690 F.2d 1170, 1180 (5th Cir. 1982).

The Court's inquiry into whether the Corps sufficiently considered practicable alternatives must be "searching and careful," but the standard of review is "narrow." To uphold the agency's decision the court must satisfy itself that the agency made "a reasoned evaluation of the relevant factors." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 376, 378 (1989). From the record before the Court, it appears that the Corps too quickly dismissed the alternative of "no mining" in the Lake Belt, as discussed in the Court's analysis of Plaintiffs' NEPA claims, above, which suggests that the Corps' analysis of practicable alternatives similarly was lacking. The Court cannot conclude that the Corps was correct when it decided that the mining industry applicants had carried their burden of proving the lack of alternatives. In rejecting an alternative that would have limited mining in the Lake Belt area in favor of mining in other Florida locations or other states or other countries, the Corps stated: "Denying future permitting would avoid impact to generally low quality Everglades habitat but would result in the loss of high quality and regionally important habitat elsewhere." AR1028 at 38.[243] However, the existence of allegedly "high

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[242]The Corps conclusory statement is unavailing. "By nature of the project, it involves work in wetlands, and no practicable alternative to working in wetlands exists." AR614 at 103.

[243]"The only way to avoid this risk to the Everglades ecosystem is to relocate the mining to other locations. ... other locations would result in impacts to other

quality and regionally important habitat" superior to the Lake Belt wetlands was never established in this record.

The CWA's requirements regarding the analysis of alternatives to the proposed mining are comparable to the Corps' analogous obligations under NEPA. "[T]he analysis of alternatives required for NEPA environmental documents ... will in most cases provide the information for the evaluation of alternatives under the [404(b)(1)] Guidelines." 40 C.F.R. 230.10(a)(4). "The only fundamental difference between alternatives analyses for NEPA and the Guidelines is that under the CWA, alternatives outside of the applicant's control may be considered." 40 C.F.R. 230.10(a)(2).[244]

The entire basis for the Corps' analysis of practicable alternatives is a single report prepared by Paul Larsen and submitted in December 1999 on behalf of the mining industry. The report, which was included as Appendix I of the EIS, AR614 at 923, was "based ... on interviews with the individuals who secured environmental permits for each mine [i.e.,

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ecosystems, and probably to a greater extent than in the Everglades since the area of mining would have to be larger and the other ecosystems are smaller than even the remaining extent of the Everglades." AR1028 at 83-84.

[244]The Corps is governed simultaneously by its own CWA regulations, e.g., 33 C.F.R. 320.4(a)(2)(ii) (must consider the "practicability of using reasonable alternative locations and methods"), those promulgated by EPA, e.g., 40 C.F.R. 230.10 (no discharge to be permitted if an environmentally preferable "practicable alternative" exists), and the NEPA regulations, 40 C.F.R. 6.203(b) (an EIS must include a balanced description of alternatives, including the "alternative of no action," and explain why certain alternatives were eliminated from detailed study), 40 C.F.R. 1502.14(a) (EIS shall "[r]igorously explore and objectively evaluate all reasonable alternatives"). Despite these varying sources of direction regarding analysis of alternatives, "[the Corps] should not conduct or document separate alternatives analyses for NEPA and the Guidelines." SOP. Although the Court has elected to segregate its analysis under the two statutes, it incorporates herein the discussion, *supra*, of the Corps' deficiencies with respect to NEPA.

miners or their consultants]." AR582. The report is quoted extensively, below, to illustrate the nature of its content -- including the frequent unsupported use of "therefore" -- and to demonstrate why the Corps should not have relied upon this report without independent verification.

> Like the Lake Belt, other locations in Florida are also faced with approximately 50 years of reserves at present levels of production. Increasing production at these locations would shorten the span of time Florida has a reliable rock supply and due to the law of supply and demand, would certainly substantially complicate the logistics and increase the cost of rock (and taxes) for building public infrastructure. Local, State and Federal regulatory approvals for expanded operations are ***uncertain*** in the alternate Florida locations. In addition, the road and rail network ***may not*** be adequate and government approvals for additional highway traffic ***may not*** be granted. Because of winter weather, rock from Nova Scotia is only produced 7 months per year. There would be problems in using Nova Scotia rock in Florida where it is needed on a 12 month basis.... Rock ***from the Bahamas has chloride levels that preclude its use for certain*** purposes. Georgia producers face serious air quality and other environmental problems. Significant expansion of those mines ***may not be possible*** for many reasons including difficulty in getting air quality permits for these 'dry' quarries.... Rock from foreign sources would have to be delivered by ship. This requires port facilities that are ***not available at present***. At present, minor amounts of rock are ***delivered*** to the Port of Tampa. But large scale deliveries by deep draft bulk cargo carriers would require new dedicated ship unloading and storage facilities.... The use of foreign rock would create extreme logistical problems and significant increases in cost." and "Analysis of an extreme case shows that alternatives could cost taxpayers up to $25 billion more than Lake Belt rock" "***Essentially*** all of these quarries are in valuable ***'habitat'*** areas, both wetlands and ***uplands***. The quality of the rock at these alternate locations ***may*** be marginal or unsuitable for many uses." "The Lake Belt yields 125,000 tons per acre. ***On a gross basis***, alternate locations yield much less. In addition, alternate locations have higher portions of clays and other deleterious materials which must be washed out before the material can be sold as aggregate. The net yield per acre at alternate locations ***can be*** from 10 to 40 percent of Lake Belt yields. Therefore, Lake Belt mining disturbs less land and habitat per ton. For example, if the alternate site yielded 30,000 tons/acre, then 4 times as much land, and habitat, would have to be disturbed as in the Lake Belt to produce the same amount of rock. Therefore, because of the high yield per acre, the Lake Belt Plan reduces overall effects on habitat compared to alternate locations in Florida." "There are huge potential reserves of rock in Dade County. Unfortunately, they are located under the urban areas, under the Water Conservation Areas and under Everglades National Park. Wetland restrictions limit their availability for mining .... Just as wetland issues limit the availability of rock in the Lake Belt, they also limit the availability of rock in ***many***

> potential alternate locations. The yield of rock at these alternate wetland locations is significantly less than in the Lake Belt. ***Therefore***, more wetlands would need to be disturbed at these alternate locations than in the Lake Belt." "In ***most*** cases, without the Lake Belt, quality rock for concrete and asphalt would need to be imported from great distances at great cost, thus substantially increasing the cost and greatly increasing the logistical difficulty associated with providing the materials for public infrastructure." "Mining in the Lake Belt will occur over the course of 50 years and at the rate of approximately 300 acres per year. In round numbers, the resulting 15,000 acres of mining will occur in 6,000 acres already permitted and on 9,000 acres which are the subject of the EIS. The impact on Lake Belt wetlands is therefore gradual and, for example, is very dissimilar from the effects of a road, or shopping center, or subdivision where all the impacts would occur in a matter of 2 or 3 years. Therefore, if practicable technological alternatives to Lake Belt rock become available, they will be implemented by the market. New technologies could include the use of byproduct materials, efficient large scale recycling, and changes in transportation infrastructure and building materials. Such technology is presently unknown. At this time, we know of no practicable alternatives to Lake Belt rock, and none have been suggested. However, if presently unknown but practicable alternatives became available during the life of the Lake Belt, they would be self executing."

AR 582 (emphasis added). The miners also had claimed that "[e]ssentially all remaining vacant lands in Dade County are wetlands.... If mining is to continue in Dade County's hard rock area, it must take place in wetlands. There is no practicable alternative to provide the State's need for rock for transportation, construction and environmental purposes." AR19 at 12. The map included with the same document does not appear to support the miners' statement. AR19 at 22 - 23 (hard rock is found all the way to the east coast of South Florida, and it is safe to assume that there are vacant parcels of land in non-Lake Belt locations in Miami-Dade County).[245]

The record includes information that appears to contradict Larsen's report and

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[245]Presumably non-wetlands, i.e., uplands, are more expensive to acquire than wetlands, which of course would affect the mining industry's consideration of such property as a practicable alternative. And, of course, local land use regulations restrict the areas in which limestone can be mined.

conclusions, as well as criticisms of the bias exhibited therein.[246] For example,

> Although not exhaustive, below is a list of websites that suggest both cement and aggregate are being brought into Florida ports. Ostensibly, these alternate sources are competing with Dade County stone and cement, and therefore should be looked at in the alternatives analysis and economic analysis in order to help determine what amount of mining crosses over from within the public interest, to excess wetland destruction that can be prevented while still being able to supply cement and aggregate from alternate sources outside of the Lake Belt to the rest of FL [listing Tampa, Palm Beach, Jacksonville ports].

AR558 (March 1998). Also see the following

> It has to be proven that Dade County stone is the only stone economically available region wide. Other Florida, as well as Georgia, Alabama, Bahaman and Yucatan sources need to be identified. After alternate sources of stone are identified, cost comparisons between the alternate sources and Dade County stone must be made, after taking into account the full cost of Dade County stone including mitigation and maintenance costs. If other viable sources of stone are available, and these sources have less environmental impact, then permits should not be issued to destroy wetlands in the Lake Belt. This could mean reducing mining output and limiting limerock distribution to the 4 county area (Dade, Broward, Monroe, and Palm Beach).

AR549/FAR123 (March 1998).

The Corps concluded its very minimal analysis of alternatives with the following statement. "The proposed 10-year mining footprint is the least damaging to the aquatic ecosystem in that it is much smaller than the 50-year total plan (which itself minimizes impact to wetlands compared to other alternatives described in the fifty year analysis) and is generally in the poorer quality wetland areas." AR1028 at 36-40, 55. "Conclusory remarks ... do not equip a decisionmaker to make an informed decision about alternative courses of action or a court to review the Secretary's reasoning." NRDC v. Hodel, 865 F.2d 288 at 298 (D.C. Cir. 1988) (Judge Ruth Bader Ginsburg) (NEPA case). The Corps's own

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[246]See discussion, above, regarding the Corps' balancing of the private and public interests and the effect of the mining representatives' advocacy.

"News Release" (Release no. 0210, released April 11, 2002) is revealing:

> Wetland loss might be avoided if mining were relocated to areas outside of the Lake Belt (assuming the wetlands were perpetually protected from all other development or uses detrimental to wetland values). However, most of those areas also have regionally or locally important environmental and habitat values. Additionally, because the rock deposits are thinner in those areas, greater acreages would have to be mined for corresponding volumes of rock. The subsurface geology in the Lake Belt area supports the mining industry infrastructure (railroads and heavy construction equipment). If the mining were relocated to other areas, the mining costs and subsequent limestone cost (to the public) could go up.

AR1144. This language reveals that the Corps made several assumptions, and none are adequately explained in the ROD or elsewhere in the administrative record. For example, the Corps apparently assumed that most, but apparently not all, other areas have environmental issues, and that the acquisition of additional property to mine in other areas could be more costly or could result in miners passing on additional costs to the public. The News Release also reports:

> If the rock were mined from other State mines or from sources outside the State, there would be considerable cost to relocate the rail network, aggregate and cement plants, and trucking infrastructure that currently distributes the rock products from the Lake Belt. Such a move would also negatively impact the Miami-Dade County and Florida State economies. In addition, other sites also have high quality and regionally important habitat.

AR 1144 at 9, AR1028 at 38-39.

The Corps earlier had announced that the analysis of alternatives was its responsibility, AR256, but then did little to guarantee that the analysis was done properly.[247]

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[247]The Corps responded to objections received from one of the environmental advocacy organizations as follows:

> We have not prepared a formal cost benefit analysis of alternate sources of rock but the Final PEIS includes a description of those sources. This reports that 34 percent of the total quantity of rock used in Florida comes from the Lake Belt, 7 percent from other States and foreign sources, and the balance [59%] from

A senior Corps staff member noted in October 1999, after receipt of Larsen's draft report, that the Corps was not interested in funding an "independent analysis" and agreed to "let" DEP Bureau of Land Reclamation look over Larsen's analysis of alternative sites. AR587.[248]

The administrative record clearly establishes that, indeed, there are other sources for limestone rock. Several of these alternative sources may be practicable and environmentally preferable, but the Corps' lack of serious study leaves this as an unanswered question. If the Corps had applied the rebuttable presumption properly, these alternative locations would have been subjected to further evaluation in order to determine their suitability. Each location was, of course, criticized by the permit applicants herein, who submitted the report analyzing these alternatives. As previously noted, the Corps's reliance

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> mines elsewhere in Florida.... In addition, from 2.1 to 3.9 acres of land at the alternate locations is needed to produce the same quantity of rock as 1 acre in the Lake Belt.... An elaborate cost-benefit analysis would add details but probably not contribute much additional information for the decision-maker.... Our current position is that the permits, if issued, will be conditioned for periodic reviews that would stop mining until additional compensatory mitigation sites are identified and added to the permits." "We value the Everglades ecosystem very highly, however our permit decisions must also weigh the rights the property owners have to use their property, the public need for material to construct houses, roads, schools, and other infrastructure, and potential ecological and economic impacts of alternatives. Decisions by the State of Florida, by Miami-Dade County and by other agencies contributed to the original decision by the landowners to locate their mining in this area. The Florida State Legislature established in 1992 the Miami-Dade County Lake Belt Plan Implementation Committee to provide a forum for all agencies, the industry, non-governmental organizations, and concerned citizens to discuss these issues.

AR637.

[248]There is no indication that this review took place, at least not prior to publication of the EIS. FAR75.