United States Court of Appeals for the Eleventh Circuit

Case No. 11-13277-EE

SIERRA CLUB, INC., PEOPLE FOR PROTECTING PEACE RIVER, INC., and MANASOTA-88, INC.,

Plaintiffs/Appellees,

v.

UNITED STATES ARMY CORPS OF ENGINEERS and COLONEL ALFRED A. PANTANO, JR., Commanding District Engineer, U.S. Army Corps of Engineers, Jacksonville District,

Defendants/Appellees,

MOSAIC FERTILIZER, LLC,

Intervenor-Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION OF INTERVENOR-DEFENDANT/APPELLANT MOSAIC FERTILIZER, LLC FOR STAY PENDING APPEAL

DAVID WEINSTEIN
KIMBERLY S. MELLO
GREENBERG TRAURIG, P.A.
Courthouse Plaza, Suite 100
625 East Twiggs Street
Tampa, Florida 33602
Telephone: 813.318.5700
Facsimile 813.318.5900

ELLIOT H. SCHERKER
BRIGID F. CECH SAMOLE
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: 305.579.0500
Facsimile: 305.579.0717

Counsel for Mosaic Fertilizer, LLC

SIERRA CLUB, et al. v. MOSAIC FERTILIZER, LLC

Case. No. 11-13277-EE

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The appellant, Mosaic Fertilizer, LLC, pursuant to 11th Cir. R. 26.1-1, 26.1-2(c) and 26.1-3, files this certificate of interested persons and corporate disclosure statement. Appellants give notice that the following persons and entities have an interest in the outcome of this review:

1. Adams, Henry Lee, Jr., Senior Judge
2. Barsh, Kerri, Attorney for Mosaic Fertilizer, LLC
3. Cargill, Incorporated
4. Cech Samole, Brigid, Attorney for Mosaic Fertilizer, LLC
5. Gallagher, Patrick, Attorney for Plaintiffs-Appellees
6. Greenberg Traurig, P.A.
7. Hopping Green & Sams, P.A.
8. Huber, Eric E., Attorney for Plaintiffs-Appellees
9. Katz, Adam J., Attorney for Federal Defendants
10. Kelsky, Brad E., Attorney for Plaintiffs-Appellees
11. LaHart, Marcy, Attorney for Plaintiffs-Appellees
12. Law Offices of Brad E. Kelsky, P.A.
13. Law Office of Thomas W. Reese
14. Manasota-88, Inc., Plaintiff-Appellee
15. Matthews, Frank E., Attorney for Mosaic Fertilizer, LLC

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT
(Continued)

16. Mello, Kimberly S., Attorney for Mosaic Fertilizer, LLC
17. Mosaic Company, The (NYSE symbol: MOS)
18. Mosaic Fertilizer, LLC, Intervenor-Defendant-Appellant
19. Nabors, Giblin & Nickerson, P.A.
20. Pantano, Jr., Alfred A., Federal Defendant
21. People for Protecting Peace River, Inc., Plaintiff-Appellee
22. Reese, Thomas W., Attorney for Plaintiffs-Appellees
23. Scherker, Elliot H., Attorney for Mosaic Fertilizer, LLC
24. Sierra Club, Inc., Plaintiff-Appellee
25. Stephens, Susan L., Attorney for Mosaic Fertilizer, LLC
26. Stewart, Gregory T., Attorney for Hardee County, Florida
27. Stokley, Heath R., Attorney for Hardee County, Florida
28. Toomey, Joel B., Magistrate Judge
29. United States Army Corps of Engineers, Federal Defendant
30. U.S. Department of Justice - Environmental Defense Section
31. Watson, Joseph N., Attorney for Federal Defendants
32. Weinstein, David, Attorney for Mosaic Fertilizer, LLC

Elliot H. Scherker

INTERVENING DEFENDANT/APPELLANTS' MOTION FOR LIMITED STAY PENDING APPEAL AND/OR TO EXPEDITE APPEAL[1]

Intervenor-Defendant/Appellant, Mosaic Fertilizer, LLC ("Mosaic"), requests the Court to enter a limited stay of the district court's Preliminary Injunction entered on July 8, 2011 ("Second Injunction")[2] pending Mosaic's appeal, and to expedite oral argument and final disposition of this appeal. Mosaic also requests the Court treat this motion as a "time sensitive" motion under Eleventh Circuit Rule 27-1(b)(1).

Mosaic filed a motion for limited stay in the district court on July 19, 2011, seeking authorization to conduct mining operations during this appeal on 600 upland acres (referred to as "Area 2") of the over 10,000 acre SFM-HC. Mosaic also requested an expedited ruling. Plaintiffs, after receiving an enlargement of time, filed their response on August 10, 2011. The next day, Mosaic renewed its request for an expedited ruling. Because of the profound harm caused by the Second Injunction, it has become impracticable to continue to wait for a ruling from the district court.[3] Fed. R. App. P. 8(a)(2).

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[1] Mosaic has also submitted an Appendix with the pertinent papers.

[2] This Court vacated the first Preliminary Injunction ("First Injunction") on April 8, 2011. *Sierra Club, Inc. v. U.S. Army Corps of Eng'rs*, 2011 WL 1334853 (11th Cir. Apr. 8, 2011).

[3] After the First Injunction was entered in July of 2010, the district court (1) failed to rule on the motion for stay pending appeal filed by Mosaic; and (2) entered an Order on August 19, 2010 stating that "the Court does not anticipate working on this case during the appeal's pendency." *Two and one-half months* after Mosaic's motion was filed, the parties entered into a partial settlement agreement that resolved Mosaic's motion. Thus, there is no basis to conclude that the district court will rule promptly on Mosaic's motion.

INTRODUCTION

Plaintiffs, Sierra Club, Inc., People for Protecting Peace River, Inc., and Manasota-88, Inc. ("Plaintiffs") filed this action challenging a Section 404 Clean Water Act ("CWA") Permit ("Permit") issued by the Army Corps of Engineers ("Corps"). The Permit authorizes Mosaic to impact wetlands and streams during phosphate mining operations at its property, referred to as the South Fort Meade Hardee County Extension ("SFM-HC").

The district court's Second Injunction places Mosaic in the worst position possible: it cannot mine at all at SFM-HC, leaving Mosaic with no ability to maintain any phosphate production there. To reach this result, the district court accepted Plaintiffs' assertion that uplands mining should be prohibited and ignored a dispositive legal principle to which it is bound: because a Section 404 CWA Permit is *not* required to conduct uplands mining, neither the Corps nor the district court have jurisdiction to act.[4] The district court has, therefore, improperly enjoined uplands-only mining: an activity that is entirely lawful and—as the Corps has unequivocally stated—is *not* subject to federal jurisdiction.

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[4] The district court's Second Injunction also flouted the mandate issued by this Court after it vacated the First Injunction. This Court's mandate expressly directed the district court, on remand, to reach a merits determination based on the full administrative record "through the deferential lens mandated by the Administrative Procedure Act ["APA"]." To provide the district court with sufficient time to do so, this Court stayed the Permit for 90 days "to permit the district court to proceed to a merits determination on the full record." However, instead of rendering a merits decision during the 90-day stay, the district court entered the Second Injunction. A separate Motion to Enforce Mandate/Petition for Writ of Mandamus was filed with this Court on July 14, 2011, in Case No. 10-13613.

Indeed, Plaintiffs previously conceded this fact stating, "[i]f Mosaic chooses to mine the uplands it can do so because that is not covered by the §404 permit."[5] In fact, before the First Injunction was entered, Plaintiffs specifically requested that the injunction be tailored "*to allow [Mosaic] to excavate non-wetland* areas while this case is adjudicated on the merits." Consistent with this request, the First Injunction authorized Mosaic to mine uplands, specifically referencing 1033 upland acres at SFM-HC referred to as the "No-Action Alternative." The district court has, therefore, completely changed its ruling based on Plaintiffs' "about-face" from their prior unequivocal statements that uplands mining should *not* be prohibited.

The district court also failed to balance the equities as required by law. Instead, the district court blindly accepted Plaintiffs' unfounded assertions that unmined, avoided wetlands would be irreparably harmed, while ignoring the overwhelming evidence, including well-established regulatory programs, protective best management practices ("BMPs"), and an unrefuted scientific study, which show that uplands mining will not adversely impact wetlands.[6] Nor did the district court consider the harm to Mosaic's employees and others as a result of the injunction. Indeed, the district court never even acknowledged that SFM-HC is

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[5] All of Plaintiffs' admissions regarding the propriety of uplands mining are set forth in the Appendix, and are collectively located at DE:159:1.

[6] Plaintiffs' primary contention was that the wetlands would be dewatered as a result of upland mining. Even though this assertion was bitterly disputed by Mosaic, the district court failed to conduct a hearing. Moreover, even if there was potential for dewatering, such dewatering is not governed by the CWA.

intended to produce up to 6 million of the approximately 16 million tons of the phosphate rock that Mosaic is committed to producing annually in order to meet the demand for phosphate-based fertilizers (a) that are vitally important to U.S. agriculture, and (b) for which there is no substitute.

Because Area 2 can support up to one year of mining, during which time this appeal will likely be resolved, Mosaic is presently seeking a limited stay to allow Area 2 uplands-only mining.

FACTS REGARDING UPLANDS MINING AT THE SFM-HC

Since the entry of the First Injunction, Mosaic has been exploring options to proceed with phosphate mining at SFM-HC to avert a mine shutdown. Mosaic determined that the No-Action Alternative, referenced by the district court in its First Injunction, was not a feasible short term upland mining option during the litigation. (DE:96, 96-3, 159-15). Mosaic had concerns that—in the event that no additional mining was permitted at SFM-HC—it could have potential environmental challenges on that discrete portion of the site. Among other things, the wetlands are interspersed throughout the No-Action Alternative area, resulting in Mosaic having to mine around all available sides of numerous wetlands in relatively small, discontiguous tracts, which would present reclamation challenges. (DE:96, 96-3). Therefore, before commencing such mining, the most prudent course was to perform additional engineering and an appropriate mitigation design that would take months to complete.[7] (DE:96, 96-3).

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[7] Had the Corps selected the No-Action Alternative, Mosaic would have had to conduct this analysis before mining could commence. The Corps, however,

Mosaic, however, identified Area 2 as a possible uplands-only mining scenario that could proceed during the litigation. (DE:118). Mosaic thus conducted the appropriate analysis and engineering to access and mine Area 2 while avoiding wetlands. Area 2 is a feasible option because, unlike the No-Action Alternative, (1) it consists of approximately 98% contiguous uplands (*i.e.*, the wetlands are not interspersed) with only 2% low quality, isolated wetlands (including a cow pond), and (2) its topography is conducive to being reclaimed even if mined independently of other areas at SFM-HC. (DE:173, 173-2). Importantly, although the Permit authorized mining of these wetlands, Mosaic's Area 2 mine plan avoids them completely—thus eliminating the need for a Section 404 permit or a National Environmental Policy Act ("NEPA") analysis. Accordingly, Mosaic filed its Notice of Area 2 Uplands Mining advising the district court and the parties of its intention to (a) conduct Area 2 uplands-only mining, and (b) implement BMPs to ensure that there would be no wetlands impacts.[8] (DE:118). Plaintiffs subsequently

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rejected it because it would "[leave] approximately 46 million tons of phosphate rock reserves unrecoverable" and, thus, would not fulfill the project purpose. (AR216906). The district court may have been confused on this important point: just because certain uplands-only mining is a *possible* alternative does not make it a *practicable* one under the Section 404 guidelines.

[8] These BMPs were required by the local, state, and federal permits and approvals for SFM-HC, including (a) the Permit, (b) the Environmental Resource Permit issued by the Florida Department of Environmental Protection, (c) the Southwest Florida Water Management District Water Use Permit, and (d) Hardee County Resolution. (DE:123-1, 159-7-14). They are similar to those Mosaic successfully implemented during Phase I mining and regularly employs to protect unmined wetlands at other mines. (DE:118, 123-1, 159-3, 159-6, 159-9, 159-13-14).

requested, and the district court entered over Mosaic's and the Corps' opposition, the Second Injunction. (DE:148, 156, 159, 159-1-15, 168).

ARGUMENT

In determining whether to grant a stay pending appeal, this Court considers, "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill,* 481 U.S. 770, 776 (1987); *accord Venus Lines Agency v. CVG Industria Venezolana de Aluminio, C.A.*, 210 F.3d 1309, 1313 (11th Cir. 2000).

These factors, however, are not "a set of rigid rules," but "contemplate individualized judgments in each case." *Hilton,* 481 U.S. at 777. Indeed, demonstrating a probability of success on the merits is not always required. *U.S. v. Hamilton*, 963 F. 2d 322, 323 (11th Cir. 1992); *Gonzalez ex rel. Gonzalez v. Reno*, 2000 WL 381901, *1 (11th Cir. 2000). Instead, when the balance of equities weighs heavily in favor of granting a stay, the movant need only demonstrate that there is a "substantial case on the merits" raising a "serious legal question." *Hamilton,* 963 F. 2d at 323. Mosaic has satisfied these requirements.

I. MOSAIC HAS A STRONG LIKELIHOOD OF SUCCESS ON APPEAL.

Mosaic has a strong likelihood of success on appeal and certainly, at a bare minimum, the appeal raises a serious legal question. The district court has repeated the same errors it made in its First Injunction (DE:88) and committed

clear error in enjoining uplands mining over which it has no federal jurisdiction. A limited stay should, therefore, be entered to allow Mosaic to conduct uplands mining in Area 2 during the pendency of this appeal.

A. The district court has repeated the same errors it made in the First Injunction vacated by this Court.

The district court concluded that Plaintiffs had demonstrated a likelihood of success on the merits because, (1) "the Corps' alternatives analysis violated the CWA and NEPA regulations and was arbitrary and capricious in that Mosaic did not clearly show less damaging alternatives were impractable [sic]"; and (2) "[t]he Corps violated its duty to independently evaluate and verify Mosaic's information." (DE:168). Mosaic's opening brief, which will be promptly filed subsequent to this motion, clearly demonstrates that the district court erred in making these findings. Mosaic's arguments are briefly summarized below.

First, the Corps clearly complied with its obligation to review alternatives under NEPA and the CWA. It carefully reviewed multiple on-site and off-site alternatives, and chose the alternative, that in its reasoned judgment, was "the least environmentally damaging practicable alternative." The district court, in concluding otherwise, improperly rode roughshod over the limits on judicial review of the agency action in concluding otherwise. *Envtl. Coal. of Broward County, Inc. v. Meyers,* 831 F.2d 984, 986 (11th Cir. 1987) ("court should give deference to the agency determination," and "[t]his is particularly appropriate in the case of complex environmental statutes such as the Clean Water Act").

Second, the Corps examined and verified Mosaic's information through multiple analyses, meetings, site visits, and other means. NEPA requires no more. 40 C.F.R. § 1506.5(a); 33 C.F.R. Part 325, Appendix B, Sec. 8(f); *Hintz*, 800 F.2d at 834-35 (upholding Corps' independent review of applicant's information where Corps made multiple requests to applicant for additional reports, consulted other regulatory agencies, and analyzed pertinent information).

B. The district court improperly enjoined the uplands without finding a likelihood of success on Plaintiffs' Area 2 claim.

The district court's finding that the alternatives analysis was flawed and the Corps violated its duty to independently evaluate and verify Mosaic's information," concern the district court's review of the Corps' *permit decision.* The sole Area 2 claim in this action, however, is Plaintiffs' contention that Area 2 mining cannot proceed until a supplemental Environmental Assessment ("EA") is performed. At most, the district court alluded to this issue in its Second Injunction but *never* made a finding that the Plaintiffs' would succeed on the merits. Without such a finding, the district court clearly erred in enjoining Area 2 uplands mining.

C. The district court did not have authority to enjoin uplands mining under the CWA.

Congress has made it clear that the Corps' CWA jurisdiction is limited to activities involving the "*discharge of dredged or fill material*" into the waters of the U.S. 33 U.S.C. § 1344; 33 C.F.R. § 328.3 (emphasis added.) Courts applying this Congressional mandate have held that "without the existence of an effluent discharge of some kind, there is no coverage under section 404," and, importantly, "*[t]here is no jurisdiction for the agencies or the courts to act.*" *Save Our Cmty. v.*

U.S. Envtl. Prot. Agency, 971 F.2d 1155, 1164 (5th Cir. 1992) (emphasis added.) The Corps acknowledged this principle in its EA for SFM-HC stating that "upland fill is not subject to the jurisdiction of the Corps," thus, "[t]he proposed SFM-HC work requiring [Corps] authorization is limited to the mechanized land clearing of and the placement of fill material into...waters of the U.S." (AR216885).

Here, it is undisputed that Area 2 uplands mining involves no Section 404 "discharge." In fact, Plaintiffs' expert conceded that the wetlands in and adjacent to Area 2 "will never be subjected to direct dredge or fill." (DE:120-5). Because no discharges will occur as a result of Area 2 uplands mining, the Corps represented to the district court that "it does not have regulatory jurisdiction over uplands" in Area 2. (DE:156, AR216885) ("upland fill is not subject to the jurisdiction of the Corps"). This statement is entirely consistent with settled precedent. *See Deltona Corp. v. Alexander*, 682 F.2d 888, 893 (11th Cir. 1982) ("[T]he Corps concedes it has no jurisdiction over uplands."); *see also Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 195 (4th Cir. 2009) ("The Corps' jurisdiction under CWA § 404 is limited to the narrow issue of the filling of jurisdictional waters."). Having no basis to find otherwise, the district court expressly noted in its Second Injunction that "Area 2 mining would not involve discharges into the waters of the United States." (DE:168).

Yet, despite the law and facts, the district court nonetheless enjoined Mosaic from Area 2 uplands mining. In so doing, the district court accepted Plaintiffs' misguided arguments that (1) a legal basis for an injunction existed solely because the Corps considered uplands in its NEPA evaluation; and (2) Area 2 uplands

mining could impact the adjacent wetlands. The district court, thus, reached the wrong result based on Plaintiffs' obfuscation of the law and facts.

1. The Permit application boundaries do not give the district court authority to enjoin uplands mining.

That uplands, including Area 2, were within the geographical boundaries of the permitted project does not support enjoining uplands mining. In evaluating Mosaic's Section 404 Permit application for the SFM-HC, the Corps concluded that it was a major federal action that warranted review under NEPA. (EA 7-8, AR216885-86). NEPA reviews can include areas and considerations outside the Corps' substantive jurisdiction—as it did here. *See Water Works & Sewer Bd. of the City of Birmingham v. U.S. Dep't of Army, Corps of Eng'rs*, 983 F. Supp. 1052, 1072 (N.D. Ala. 1997) (distinguishing Corps' statements regarding scope of review and scope of jurisdiction); *see also* 33 C.F.R. pt. 325, App'x B, § 7(b)(2)(A). In fact, the Corps acknowledged that Area 2, like other uplands within the SFM-HC, was within the scope of its NEPA review. "Scope of NEPA review," however, is *not* the same as CWA authority to regulate.

The Corps' CWA jurisdiction is determined not by NEPA, but by the CWA alone. NEPA provides a procedure for an agency to consider the environmental consequences of its actions once the CWA is implicated. *Dep't of Trans. v. Public Citizen*, 541 U.S. 752, 756–57 (2004.) Once triggered, NEPA does *not* expand the Corps' jurisdiction. *See Nat. Res. Def. Council v. EPA*, 822 F.2d 104, 129 (D.C. Cir. 1987) (collecting cases). The Courts have made it clear that without CWA jurisdiction, a district court does not have a legal basis to issue an injunction. *Save*

Our Sonoran, Inc. v. Flowers, 408 F.3d 1113 (9th Cir. 2005).

Thus, the district court's reasoning is fatally flawed. Merely because Area 2 was within the scope of the Corps' NEPA review does not grant the district court the power to enjoin uplands mining. In fact, preliminary injunctions have only properly issued when, unlike this case, (1) CWA jurisdiction exists, and (2) the Corps improperly confines its NEPA analysis to the jurisdictional waters rather than the entire site. *Save Our Sonoran*, 408 F.3d at 1118. Even then, a NEPA violation is *not* without more a sufficient basis to warrant a preliminary injunction. The *Save Our Sonoran* court stated as follows:

> The authority to enjoin development extends only so far as the Corps' permitting authority. Although the Corps' improperly constrained analysis violated NEPA, *the district court could only enjoin the developer from acts that required a Corps permit.*

Id. at 1123 (emphasis added.) The court, therefore, held that because the "washes subject to federal jurisdiction could not be segregated from private lands; the district court had the power to enjoin the entire project."[9] *Id.* at 1123.

There are two dispositive distinguishing factors in this case: First, Area 2 consists of a discrete 600 upland acres that does not require a Section 404 permit. Second, Area 2 was selected for uplands-only mining precisely because of the isolated, largely peripheral jurisdictional wetlands, consisting of only 2% of Area 2, which can and will readily be segregated from the uplands.[10] (DE:173-2)

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[9] The court stated that the "jurisdictional waters run throughout the property like capillaries through tissue" such that "any development the Corps permits would have an effect on the whole property." *Id.* at 1122.

[10] This is in stark contrast to mining under the No-Action Alternative that the

(showing that the Area 2 wetlands are not interspersed with the uplands). The *Save Our Sonoran* court expressly held that a preliminary injunction is improper in this circumstance, stating,

> If Lone Mountain can demonstrate to the district court that a portion of the contested property can be developed without affecting the jurisdictional waters, so that no Section 404 permit would be required, then the preliminary injunction must be modified accordingly.

Id. at 1125. Mosaic has shown exactly that and, accordingly, the district court's misapplication of the law is patent.

2. The district court improperly based the injunction on Plaintiffs' claim of wetlands impacts.

The district court also erred in concluding that even though there will be no "discharges," there was a potential for "impacts" to wetlands that provides a basis for an injunction. (DE:168). The district court based its assumption of wetlands impacts based on Plaintiffs' speculative assertions that Area 2 uplands mining would dewater the wetlands—a point bitterly disputed by Mosaic and for which the district court wrongly refused to hold a hearing before issuing the injunction.[11]

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district court expressly authorized in its First Injunction, but which Mosaic determined was not feasible. As previously noted, the wetlands in the No-Action Alternative are interspersed throughout the uplands presenting mining challenges. It is simply unsupportable to enjoin uplands mining on 600 upland acres containing two isolated wetlands that will be avoided, while having previously authorized mining of the No-Action Alternative, which Mosaic candidly admitted raised potential environmental concerns.

[11] Plaintiffs' expert, who is unqualified, stated in his declarations (which Mosaic moved to strike) that he believes the BMPs will be ineffective. In contrast, Mosaic provided voluminous evidence that the BMPs are routinely utilized to prevent dewatering, and filed an expert report establishing the success of these BMP at previously mined areas at the Polk County portion of the South Fort Meade mine.

See Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, S.A., 320 F.3d 1205, 1212 (11th Cir. 2003) (when the material facts are disputed, the district court is required to hold a hearing); *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1312 (11th Cir. 1998) (same).

However, even if dewatering of wetlands from uplands mining might occur, those facts do not trigger the Corps' CWA jurisdiction—and by extension, the district court's injunctive authority—over Mosaic's uplands-only mining. *See Save Our Sonoran*, 408 F.3d at 1123. The district court disregarded the settled principle that the CWA does *not* invest the Corps with general police powers over waters of the United States. *Save Our Cmty.*, 971 F.2d at 1164 ("[T]he federal government has not taken upon itself to resolve all environmental issues which arise in the United States."). Rather, the CWA charges the Corps with regulating specific activities in jurisdictional waters. *See* 33 C.F.R. § 320.1(b) (listing those activities that fall within Corps' authority under CWA). The dewatering of a wetland is *not* a "discharge," and, consequently, is *not* an activity subject to a Section 404 Permit. *Save Our Cmty.*, 971 F.2d at 1167 ("[W]etlands draining activity per se does not require a section 404 permit under the CWA, as only activities involving discharges of effluent necessitate obtaining such a permit.").[12]

(DE:123-1, 159-3-4, 159-6-14).

[12] *Accord Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 963 (9th Cir. 2006); *North Carolina v. FERC*, 112 F.3d 1175, 1188 (D.C. Cir. 1997); *U.S. v. Wilson*, 133 F.3d 251, 260 (4th Cir. 1997); *Col. Wild, Inc. v. U.S. Forest Service*, 122 F. Supp. 2nd 1190, 1193 (D. Col. 2000); *U.S. v. Mango*, 997 F. Supp. 264, 286 (N.D.N.Y. 1998), *rev'd on other grounds,* 199 F. 3d 85 (2nd Cir. 1999).

Thus, the district court had no authority enjoin uplands mining based on these potential wetland impacts.

3. The possibility of permit modification does not provide a legal basis to enjoin Area 2 mining.

The district court also mistakenly believes that it had authority to enjoin Mosaic because "Plaintiffs make a compelling argument that Mosaic's Area 2 proposal should be examined as a modification to the overall plan." (DE:168.) To the extent that Plaintiffs claim that the reclamation plans must be modified, the law is clear that, in the absence of a Section 404 permit, the state, not the Corps, regulates reclamation in uplands. Therefore, regardless of whether the Permit is enjoined, Area 2 remains subject to Florida's reclamation laws. The district court should not have enjoined activities under a *federal* permit based on a possibility that the *state* might independently require modification of a separate Florida permit.

Moreover, even assuming *arguendo* that the Corps believed that Area 2 uplands mining requires a Permit modification, that is a decision that can be made *only* by the Corps. "[A] decision [by the Corps] not to modify, suspend or revoke a Section 404 permit is one committed to the Corps' absolute discretion, and, as such, it is not reviewable under the Administrative Procedure Act." *Missouri Coal. for the Env't v. Corps of Eng'rs of the U.S. Army*, 866 F.2d 1025, 1032 n. 10 (8th Cir. 1989), *overruled on other grounds*, *Goos v. I.C.C.*, 911 F.2d 1283 (8th Cir. 1990); *accord Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (judicial review is not available when an agency refuses to take enforcement steps because such decision

is committed to the agency's absolute discretion); *Harmon Cove Condo. Ass'n, Inc. v. Marsh*, 815 F.2d 949 (3d Cir. 1987) (same). The Corps has made *no* such decision here. Thus, the district court has improperly speculated on what the Corps *might* do in the future.[13]

II. THE BALANCING OF EQUITIES WEIGHS HEAVILY IN FAVOR OF MOSAIC.

The balancing of equities weighs heavily in favor of issuing a stay pending appeal that permits Area 2 uplands-only mining. Such mining will provide limited production for at least a year, the estimated duration of the appeal, at levels needed to meet Mosaic's phosphate production commitments, provide continued employment for over 200 people, and result in significant tax revenues to the state and Hardee County. These facts must be weighed against Plaintiffs' distorted picture of the potential for wetland impacts, which were contradicted by overwhelming evidence filed by Mosaic.

A. The Second Injunction lacks findings of irreparable harm as a result of Area 2 upland mining.

The Supreme Court has held that, "[i]ssuing a preliminary injunction based only on *a possibility of irreparable harm* is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council*, --- U.S. ---, 129 S. Ct. 365, 375-76 (2008) (citation omitted;

[13] Indeed, even if the district court required a supplemental EA, as requested by Plaintiffs, the Corps could and likely would find that no permit modification is required.

emphasis added); *accord Monsanto Co. v. Geertson Seed Farms,* --- U.S. ---, 130 S.Ct. 2743, 2757 (2010). Instead, Plaintiffs must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 129 S. Ct. at 375 (citations omitted; original emphasis). The Second Injunction runs directly afoul of this exacting standard.

The district court's irreparable-injury analysis is almost non-existent. The district court states in a single sentence that "Mosaic's own declaration (DE:96-3), which was submitted in August of 2010 to support its argument that uplands mining is not feasible, indicates that mining uplands will have adverse impacts on wetlands in the project area." (DE:168). Mr. Myers declaration, however, addressed challenges concerning uplands mining of the No-Action Alternative, *not* the feasibility of Area 2 uplands mining, which had not been contemplated or even identified at the time of his declaration. Unlike the No Action Alternative, Area 2 does not involve mining around wetlands interspersed throughout the uplands, but instead involves mining 98% contiguous uplands, with only two isolated wetlands totaling 1.3 acres. In addition, the topography in Area 2 is entirely different, alleviating reclamation concerns. Moreover, the environmental concerns expressed by Mr. Myers regarding the No Action Alternative were based on the potential that Mosaic could *never* mine under the Permit. (DE:159:15) If additional mining is prohibited after Area 2 has been mined, however, Mr. Myers has stated that reclamation can and will be effectively completed. Therefore, the district court's reliance on Mr. Myers original declaration is entirely misdirected.

It is neither surprising nor suspect that Mosaic is able to mine Area 2

avoiding direct wetland impacts and using protective BMPs to avoid possible indirect impacts to wetlands. The BMPs have been extensively evaluated, not only by Mosaic, but by state and federal agencies over many years, as reflected in the governing legal requirements and multiple expert studies in the Administrative Record. These include obtaining the necessary local and state approvals; use of recharge ditches that were thoroughly considered at the local, state, and federal levels and found to be effective based on rigorous analysis and modeling; use of BMPs required by local, state, and federal agencies; and regular monitoring by these agencies to ensure that there is no dewatering. (DE:123-1, 159-3, 159-6-14). The findings are unanimous: adverse impacts to the adjacent wetlands from phosphate mining can and will be avoided. (DE:123-1, 159-3-4, 159-5-6). In fact, because of the pending litigation, Mosaic, commissioned an April 2011 scientific study, that is unrefuted by Plaintiffs, which confirmed that BMPs would fully protect the wetlands in and adjacent to Area 2. (DE:159-5).

The district court also attempts to buttress its conclusion of irreparable harm by stating that the "repair of the excavated wetlands and streams with human engineered wetlands and streams is controversial." (DE:168). First and foremost, this finding is wholly irrelevant since *no* wetlands or streams will be excavated for Area 2 mining. Moreover, the fact that there may be a controversy does not constitute irreparable harm. Both the federal and state governments have concluded that the adverse wetland impacts from mining are reparable through compensatory mitigation, including reclamation. Irreparable harm does not exist with these approved mitigation and reclamation plans. *See, e.g., Sierra Club v. U.S. Army*

Corps of Eng'rs, 2005 WL 2090028, *19 (D.N.J. Aug. 29, 2005) (rejecting irreparable injury claim because Corps concluded that the mitigation was sufficient to compensate for any environmental impacts); *Citizens Alliance to Protect Our Wetlands v. Wynn*, 908 F. Supp. 825, 833–34 (W.D. Wash. 1995) (rejecting argument of irreparable harm because "[c]onsidering the mitigation required . . . , the environment on the whole will not suffer irreparable injury.")

B. There was no evidence that any purported harm was imminent.

Plaintiffs asserted that mining near the isolated wetlands on the property will create a "wetlands island" surrounded by mining resulting in irreparable harm. The Area 2 mine plan, however, submitted to the district court, shows that Mosaic planned to mine in 2011 only near the northern end of the cattle pond (*i.e.*, one of the two isolated wetlands in Area 2). (DE:159-3). The theoretical prospect of "encircling" this cattle pond that does not even arise until mining planned for mid-2012. While Mosaic can and will protect the wetland at that time, there certainly is no *imminent* harm. And the isolated wetlands in Area 2 will not themselves be disturbed. (DE:159-3); s*ee also Sierra Club v. U.S. Army Corps of Eng'rs*, 2007 WL 402830, at *1 (M.D. Fla. Feb. 1 2007) (request for an injunction pending appeal denied—even though district court found irreparable harm—because extent of environmental harm that might occur during appeal was questionable). Thus, as a practical matter, the appeal—which Mosaic has requested be expedited—may conclude before these wetlands are even "encircled."

Notwithstanding these facts, the district court states that "[t]he harm is imminent in that, according to its schedule, Mosaic has already cleared a dragline

access path to Area 2, built a ditch and berm system in a portion of that area, and gave notice that in "early July 2011" its draglines begin mining Area 2." (DE:168). Activities that have already been completed obviously cannot form the basis for an injunction. Further, based on the evidence before the Court, the uplands mining scheduled for early July 2011, presented no imminent harm to wetlands, which will not be disturbed during Area 2 mining.

C. The inability to mine Area 2 will cause profound harm.

The district court failed to consider the harm that inevitably will be caused to Hardee County, Polk County, Mosaic, its employees, contractors, and other local companies doing business with Mosaic. The record is replete with evidence that enjoining Area 2 mining will have deleterious and far-reaching repercussions: Hardee County, classified as an economically challenged county, will be directly impacted through the loss of taxes, fees, jobs, and unreclaimed lands.[14] Polk County will be directly impacted by the loss of taxes and jobs.[15] The effects to Mosaic's employees and their families will be devastating.[16] Non-Mosaic employees and jobs will be negatively impacted.[17] And Mosaic's suppliers,

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[14] Declaration of Lexington Albritton, Jr. (Hardee County Manager). (DE:60-6).

[15] Declaration of Bob English (Chairman of Polk County Board of County Commissioners) (DE:59-2).

[16] Declarations of various Mosaic employees (DE:49-1-12, 50-1-14); *see also* Declaration of Frank Cyphers (United Food and Commercial Workers Local 814) (DE:58-2); Declaration of Michael V. Chester (President, United Food and Commercial Workers Local 814) (DE:58-4).

[17] Declaration of Tampa Port Authority (DE:59-1); Declaration of Michael E. Rahm, PhD (DE:60-2).

vendors, and contractors will also be harmed.[18]

Nor has the district court ever acknowledged the significant role of phosphate mining and production to the regional, state, and national economies. The Florida Legislature has made it clear that the *"extraction of phosphate is important to the continued economic well-being of the state and to the needs of society."* § 378.202, Fla. Stat. (emphasis added.) This pronouncement reflects a legislative recognition of the importance of phosphate mining to the State of Florida that should not be, but has been, ignored.

The facts before the district court demonstrated that the isolated wetlands in Area 2 are not at risk and that no irreparable, imminent environmental impacts would occur. Indeed, not a single agency charged with protecting the environment has objected to Mosaic's Area 2 upland mining. On the other hand, there is absolute certainty that preventing all mining at SFM-HC will negatively impact phosphate production, state and county revenues during difficult economic times, and harm the people who depend on SFM-HC for their livelihood. Instead of considering these profound harms, the district court simply adopted Plaintiffs' unsubstantiated assertions of irreparable harm, notwithstanding the lack of federal jurisdiction over uplands-only mining.

CONCLUSION

For the foregoing reasons, Mosaic respectfully requests that this Court (1) enter a limited stay of the Second Injunction to allow Mosaic to conduct uplands-

[18] Declarations of various suppliers, vendors, and contractors (DE:52-1-16).

only mining in Area 2 during the pendency of the appeal; and (2) expedite the resolution of this appeal.

Respectfully submitted,

David Weinstein
Kimberly S. Mello
Greenberg Traurig, P.A.
Courthouse Plaza, Suite 100
625 East Twiggs Street
Tampa, Florida 33602
Telephone: 813.318.5700
Facsimile: 813.318.5900

Elliot H. Scherker
Brigid F. Cech Samole
Greenberg Traurig, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: 305.579.0500
Facsimile: 305.579.0717

By: 
Elliot H. Scherker

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion was mailed on August 22 2011 to:

Brad E. Kelsky
Law Offices of Brad E. Kelsky, P.A.
10189 Cleary Blvd., Ste. 102
Plantation, FL 33324

Pat Gallagher
Sierra Club
85 Second St., 5th Floor
San Francisco, CA 94105

Adam J. Katz
Environmental Defense Section
Department of Justice
P.O. Box 23986
Washington, D.C. 20004

J. Nathanael Watson
Natural Resources Section
Department of Justice
P.O. Box 663
Washington, D.C. 20044

Marcy LaHart
4804 S.W. 45th Street
Gainesville, FL 32608

Eric E. Huber
1650 38th St.
Suite 120W
Boulder, CO 80301

Frank E. Matthews
Susan L. Stephens
Hopping Green & Sams, PA.
123 South Calhoun Street
P.O. Box 6526
Tallahassee, Florida 32314-6526

Elliot H. Scherker