APPENDIX

APPENDIX TABLE OF CONTENTS

Page

vi. Other Material

[ENTERED: July 11, 2018]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-30438

WHITE OAK REALTY, L.L.C.; CITRUS REALTY, L.L.C.,

Plaintiffs - Appellants

v.

UNITED STATES ARMY CORPS OF ENGINEERS; THOMAS P. BOSTICK, Lieutenant General, United States Army Chief of Engineers, in his official capacity; JOHN W. PEABODY, Major General, Commander, Mississippi Valley Division, United States Army Corps of Engineers, in his official capacity; RICHARD L. HANSEN, Colonel, Commander, New Orleans District, United States Army Corps of Engineers, in his official capacity,

Defendants - Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:13-CV-4761

Before WIENER, GRAVES, and HO, Circuit Judges.[1]

---

[1] Judge Ho concurs in the judgment only.

PER CURIAM:*

This dispute involves a challenge to environmental mitigation requirements imposed by the U.S. Army Corps of Engineers (the "Corps") as a prerequisite to excavate and sell soil from private property for use in the Corps's projects. Appellant claims the mitigation requirements are contrary to federal law and unconstitutional. The district court granted the Corps summary judgment on all claims. We affirm.

BACKGROUND

In the wake of Hurricanes Rita and Katrina, Congress tasked the Corps with a series of projects collectively known as the Greater New Orleans Hurricane and Storm Damage Risk Reduction System ("HSDRRS"). The HSDRRS required construction, on an "emergency schedule," of numerous levees, floodwalls, gates, and pumps within Southeastern Louisiana. Corps engineers estimated that completion of the HSDRRS would require 31,000,000 cubic yards of suitable "borrow material."[2]

In order to acquire the needed material, the Corps considered three options: (1) "government-furnished" borrow material, (2) "contractor-furnished" borrow material, and (3) supply contracts. Only the government-furnished and contractor-furnished options are relevant to this appeal.

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[2] "Borrow material" refers to soil "dug in one location for use at another."

Under the government-furnished option, the Corps would seek to directly obtain the property rights to extract borrow material from an identified piece of land. Under the contractor-furnished option, the Corps would require construction contractors to work "in partnership with a landowner to provide suitable borrow material from the landowner's property."

In 2008, the Corps considered acquiring the rights to mine government-furnished borrow material on Idlewild, a tract of land owned by White Oak Realty, LLC ("White Oak"). In response, White Oak, fearing a potential eminent domain action against its property, sent the Corps letters informing the Corps that it was "pursuing the property for contractor supply borrow material," and requesting that the Corps "cease and desist any and all activity pertaining to government supplied borrow at Idlewild." The Corps declined to cease consideration of Idlewild as a source of government-furnished borrow material. Nonetheless, the Corps informed White Oak that it remained "free to utilize [its] property in any manner" pending further notification on the Corps's intentions. The Corps never pursued an eminent domain action.

In 2009, White Oak applied for a permit to excavate clay on Idlewild as a source for contractor-supplied borrow material. The Corps pre-approved[3]

[3] Pre-approval did not guarantee that the Corps's contractors would select Idlewild as a source of borrow material. It merely meant that the Corps would list Idlewild as a pre-approved site. Contractors were "not obligated to select a site from the contractor-furnished clay source list." "Agreements for use of a contractor-furnished site would solely be between a construction contractor and the landowner, and at no point in time would the landowner have an agreement with the [Corps]."

the permit in October 2010 — with a caveat. As part of its review, the Corps had determined that clay excavation on Idlewild would cause adverse environmental impact on bottomland hardwood forests ("BLH"). To offset that impact, the Corps required mitigation of those environmental impacts "through the purchase of mitigation bank credits." Purchase of bank credits was only required, however, if Idlewild's resources were excavated "for use in building the HSDRRS." "[I]f borrow excavated at [Idlewild] [was] not used in the construction of a [Corps] water resources project, there [was] no [Corps] requirement that impacts to non-wetland bottomland hardwoods be mitigated."

Upset by the cost of available mitigation bank credits, White Oak proposed to fulfill its mitigation requirements by placing 158.36 acres of "wetland and jurisdictionally determined non-wetland" forest in a conservation servitude. The Land Trust for Southeast Louisiana would then work to ensure that the land remained pristine.

The Corps rejected White Oak's proposal on the grounds that mitigation bank credits were "preferred by both statute and regulation" and were "the most efficient, timely and effective means to achieve the required compensatory mitigation for impacts to contractor-furnished borrow area." The Corps further explained that the "creation and approval of a mitigation plan is a lengthy and detailed process that can take a year or more." "Not only [did] the [Corps] not have the manpower to devote to this process for every contractor-furnished borrow site, but it would significantly delay the approval and use of those sites."

The parties then exchanged correspondence for a number of years discussing whether a non-mitigation bank alternative would suit the Corps. Eventually, on February 20, 2013, District Commander Edward Fleming sent a final notice to White Oak reiterating the bank credit mitigation requirement.

In response, White Oak filed the instant suit against the Corps on June 10, 2013, alleging that: (1) the Water Resources Development Act ("WRDA") does not authorize the Corps to require private parties to pay for the mitigation costs, (2) the WRDA does not authorize the Corps to require purchase of mitigation bank credits in this instance, and (3) a taking under the Corps's mitigation plan would be unconstitutional under the Fifth Amendment.

Shortly thereafter, the Corps filed a motion to dismiss the complaint for lack of Article III standing, which the district court denied. The parties then filed cross motions for summary judgment. After summary judgment briefing had concluded, White Oak moved to supplement the administrative record.

On May 4, 2016, the district court denied White Oak's motion to supplement as untimely and unnecessary. The court subsequently granted summary judgment in favor of the Corps on all claims. This appeal timely followed.

STANDARD OF REVIEW

"This court reviews a grant of summary judgment *de novo*, applying the same standard to review the agency's decision that the district court

used." *Baylor Cty. Hosp. Dist. v. Price*, 850 F.3d 257, 261 (5th Cir. 2017).

As an initial matter, White Oak claims that the district court erred in applying *Chevron* deference to the Corps's interpretation of the WRDA. White Oak argues that only *Skidmore* deference is owed because the Corps's interpretation does not carry the force of law. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

"To determine the appropriate level of deference to the [Corps's] interpretation of the [WRDA], we are guided by the two-step analysis set forth in *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)." *See Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 454 (5th Cir. 2015). "[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears [(1)] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-27. "It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Id.* at 230.

Congress delegated to the Corps the power to develop mitigation plans under the WRDA. *See* 33 U.S.C. § 2283(d). Congress further provided for a formal administrative procedure for developing those plans, requiring the Corps to "make a draft of the

plan available for review and comment by applicable environmental resource agencies and the public," and "consider any comments received from those agencies and the public on the draft plan." *See id.* § 2283(h)(7). The record indicates that the Corps promulgated the mitigation requirements pursuant to these procedures. Accordingly, the district court properly afforded the Corps's decisions *Chevron* deference. *See Mead*, 533 U.S. at 226-27, 230.

Under *Chevron*, we employ a two-step analysis when reviewing an agency construction of a statute. First, we answer "the question whether Congress has directly spoken to the precise question at issue." *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. "If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute[.]" *Id.* at 843. "Rather . . . the question for the court is whether the agency's answer is based on a permissible construction[.]" *Id.*

DISCUSSION

White Oak presents four arguments on appeal. First, White Oak challenges the Corps's power under the WRDA to impose the mitigation requirement on a private party. Second, White Oak contends that the Corps violated the WRDA by demanding that White Oak purchase wetland mitigation bank credits. Third, White Oak claims that the mitigation requirement amounted to an unlawful taking under

the Fifth Amendment. Fourth, White Oak asserts that the district court erred in denying its request to supplement the record.

Before turning to the merits of White Oak's arguments, however, we first address the Corps's contention that White Oak lacks Article III standing to assert any of its claims.

I. White Oak has Article III standing.

The Corps maintains that White Oak lacks Article III standing because it cannot allege an injury. First, the Corps claims White Oak did not possess a property interest in the borrow material at the relevant time. Second, the Corps argues that White Oak's "lost profits or lost business opportunities" are entirely speculative. We disagree.

"Because the WRDA establishes no specific right to judicial review of an agency action, [White Oak] must establish standing under the general provisions of the APA." *Envtl. Def. Fund v. Marsh*, 651 F.2d 983, 1003 (5th Cir. Unit A Jul. 1981). To do so, White Oak "must allege some injury in fact, and that the injury is arguably within the zone of interests[4] to be protected or regulated by the statutes that the agencies (are) claimed to have violated." *Id.* (internal quotations omitted). "The Supreme Court has indicated that courts should not be austere in granting standing under the APA to challenge agency action taken pursuant to a statute." *Id.*

[4] The Corps does not argue that White Oak's alleged injuries fall outside of the WRDA's "zone of interest." We therefore do not address that issue on appeal.

The Corps asserts that the mitigation requirement could not have injured White Oak because "White Oak did not own the borrow" at the relevant time. Though White Oak did sell the right to mine the clay from its property, the purchase price was $5.60 "per ton of Materials mined and removed." White Oak therefore retained an ongoing financial interest in mining the clay, which, White Oak asserts, the Corps's mitigation requirements inhibited by excluding White Oak from the borrow market. White Oak's retained financial interest in the per ton purchase price, and alleged injury thereto, is sufficient to establish Article III standing. *See Cottrell v. Alcon Labs.*, 874 F.3d 154, 163 (3d Cir. 2017) (quoting *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291, 293 (3d Cir. 2005)) (stating that financial harm is a "classic" and "paradigmatic" form of injury in fact).

The Corps next argues that any potential lost business opportunities are "entirely speculative" because "contractors may choose their own sites from which to obtain borrow" and "there was no guarantee that Idlewild borrow would ever be used." The record shows that the lost business opportunity was not as speculative as the Corps asserts. The mining company that held the rights to White Oak's borrow material had a contract to provide borrow from Idlewild in connection with specific Corps's contracts. The mining company's contract was "contingent upon acceptance of the pit" by the Corps. "It is unrealistic to believe that these Corps [mitigation requirements] [did] not have a direct impact" on the fulfillment of that contract. *See Marsh*, 651 F.2d at 1004.

The district court did not err in concluding that White Oak had Article III standing to bring its claims. We accordingly turn to the merits of White Oak's arguments on appeal.

II. The mitigation requirement is permissible.

White Oak first argues that the Corps's mitigation requirement conflicts with the WRDA for two reasons: (1) it is inconsistent with WRDA provisions requiring mitigation planning prior to project implementation; and (2) the WRDA does not grant the Corps authority to require private parties to pay for mitigation. Neither argument has merit.

1. Corps reasonably required mitigation for Idlewild impacts.

According to White Oak, the Corps's "*post hoc* imposition of mitigation responsibility" conflicts with the WRDA's requirement that the Corps "assess potential impacts and submit a specific plan for mitigation as part of a project proposal . . . before it is approved." We are unpersuaded.

There are, as White Oak asserts, provisions in the WRDA indicating that the Corps must undertake mitigation prior to project implementation and budgeting. For example, § 2283 states that mitigation "*shall* be undertaken or acquired *before* any construction of the project." 33 U.S.C. § 2283(a)(1) (emphasis added). Section 2283 further states that the Corps "*shall* not submit any proposal for the authorization of any water resources project" unless that proposal contains a "specific plan to mitigate for damages to ecological resources." *See id.* § 2283(d)(1) (emphasis added). These provisions

provide some support to White Oak's argument that mitigation plans must be set forth in advance of project implementation.

The WRDA is not, however, as clear as White Oak asserts. For instance, § 2283 also states that the Corps may implement mitigation requirements "*concurrently* with lands and interests in lands for project purposes." *Id.* § 2283(a)(1) (emphasis added). Likewise, Congress authorized the Corps to "mitigate damages to fish and wildlife resulting from any water resources project under [its] jurisdiction, *whether completed, under construction, or to be constructed.*" *Id.* § 2283(b)(1) (emphasis added). Section 2280, regarding budgeting, provides that a total budget "shall be automatically increased" for mitigation authorized by the WRDA. These provisions indicate that the Corps can account for, and impose, mitigation as needed during the course of a project.

The WRDA is, therefore, ambiguous with respect to whether the Corps may impose mitigation requirements after project implementation. As a result, we may not "impose [our] own construction" on the statutory language. *Chevron*, 467 U.S. at 843. Rather, "the question for the court is whether the [Corps's] answer [to this issue] is based on a permissible construction of the statute." *Id.* It is.

The Corps interprets the WRDA as requiring mitigation for all "habitat losses caused by water resources projects." Following that reasoning, the Corps concluded that "impacts to [BLH] associated with borrow that will be used in construction of a [Corps] water resources project must be mitigated." Therefore, the Corps determined that the WRDA

required mitigation for any impact to Idlewild "if . . . selected by construction contractors for use in building the HDRRS." This is an entirely permissible construction of the statute.

The WRDA commands that the Corps mitigate for any impacts "resulting from" or "created by" a water resource project. 33 U.S.C. §§ 2283(b)(1), (d)(1). To fulfill that mandate, Congress authorized the Corps to mitigate damages resulting from "*any* water resources project under [its] jurisdiction." *Id.* § 2283(b)(1) (emphasis added). Indeed, Congress expressly stated its intent that the Corps "include environmental protection as one of the primary missions of the Corps of Engineers in planning, designing, constructing, operating, and maintaining water resources projects." *See id.* § 2316(a).

The district court did not err in concluding that the Corps's mitigation requirement was a reasonable interpretation of this statutory scheme and was therefore entitled to *Chevron* deference.

2. Corps reasonably required White Oak to bear costs.

White Oak next argues that the mitigation requirement fails *Chevron* deference because it adds private entities to a statutory scheme that unambiguously excludes them. Again, we disagree.

Contrary to White Oak's contention, the WRDA does not unambiguously exclude the option of shifting mitigation costs to third-parties. In fact, "mitigation costs . . . shall be subject to cost sharing or reimbursement to the same extent as such other project costs are shared or reimbursed." *Id.* § 2283(c).

Without a doubt, the WRDA does not define the meaning of "third-party mitigation arrangement" in great specificity. There is also a lack of detail on the "extent" of permissible "cost sharing" and "reimbursement." That is to say, the WRDA is ambiguous on the question presented. As a result, "the question for the court is whether the [Corps's] answer [to this issue] is based on a permissible construction of the statute." *See Chevron*, 467 U.S. at 843.

In light of the statutory provisions cited above, we conclude that it is. The district court did not err in concluding that the Corps reasonably interpreted the WRDA in shifting the initial mitigation costs to private parties.

III. The purchase requirement is permissible.

White Oak argues unconvincingly that the Corps violated the WRDA by limiting White Oak's mitigation options to the purchase of upland mitigation bank credits.

White Oak's argument is essentially that the Corps violated the WRDA's preference for "in-kind" mitigation by demanding the purchase of "wetland" mitigation bank credits for the loss of "upland" forests. This argument fails to recognize that the WRDA only requires "in-kind" mitigation "to the extent possible." 33 U.S.C. § 2283(d)(1). There is no evidence that the Corps unreasonably concluded that in-kind mitigation was not possible in this instance.

The parties agree that no upland BLH credits were available to purchase. White Oak's only proposed in-kind alternative was its conservation lien plan. The Corps rejected this alternative,

however, on the grounds that it would be less efficient, timely, and effective than requiring the purchase of wetland mitigation credits. Further, the Corps stated that it did not have the resources to devote to the extensive process of reviewing the plan. White Oak has presented no evidence that the Corps unreasonably reached that conclusion.

We therefore agree with the district court that the purchase requirement "is in line with the plain language of the WRDA and is a reasonable interpretation thereof."

IV. There was no unconstitutional taking.

White Oak contends that the Corps's mitigation and purchase requirements amount to an unconstitutional taking under the Fifth Amendment. The argument is meritless. Indeed, White Oak cannot meet either prong of a takings analysis.

"When evaluating whether governmental action constitutes a taking, a court employs a two-part test." *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1329 (Fed. Cir. 2012). "First, as a threshold matter, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking." *Id.*; *see also Dennis Melancon, Inc. v. New Orleans*, 703 F.3d 262, 269 (5th Cir. 2012) ("[A] plaintiff first must demonstrate that he has a protectable property interest[.]"). "Second, if the court concludes that a cognizable property interest exists, it determines whether that property interest was 'taken.'" *Hearts Bluff*, 669 F.3d at 1329.

White Oak's takings claim fails to assert either a protected property interest or a taking.

First, White Oak has no property interest in selling borrow material to the Corps's contracting program. In its efforts to sell to the Corps, White Oak voluntarily[5] entered into a market over which the Corps possessed strong regulatory control. "[A] protected property interest simply 'cannot arise in an area voluntarily entered into . . . which, from the start, is subject to pervasive Government control[.]'" *Dennis*, 703 F.3d at 272 (omission in original) (quoting *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 216 (Fed. Cir. 1993)).

Second, even if White Oak could allege a protected property interest, such as the right to sell borrow to non-Corps entities or otherwise commercially develop its property,[6] White Oak has

---

[5] White Oak claims that the Corps "forced" it to excavate clay on part of Idlewild, which then effectively deprived White Oak of use of the remaining land because of the prohibitive mitigation costs needed to continue excavation. There is no evidence in the record that the Corps ever "forced" White Oak to pursue participation in the borrow material market.

[6] White Oak purchased Idlewild with the intent to commercially develop the property, and argues that clearing the BLH on Idlewild cannot require mitigation under the WRDA because White Oak cleared the BLH prior to obtaining a Corps's contract and would have done so for its planned development project either way. This argument is unpersuasive for at least three reasons. First, it is unsupported by the record. There is no indication that White Oak cleared Idlewild for any purpose other than participation in the federal borrow material market. Second, the Corps only required mitigation if the borrow material was used for a Corps project. Therefore, if White Oak cleared Idlewild for a non-Corps related purpose, no

failed to show that the Corps ever "took" any property. From the beginning, the Corps informed White Oak that it was "free to utilize [its] property in any manner [it] choose[s]." The Corps then pre-approved Idlewild as a borrow site, thus granting White Oak the ability to mine borrow material for Corps's projects, subject to the mitigation requirement. At worst, the mitigation requirement frustrated White Oak's ability to sell its clay to Corps's contractors at a competitive price. However, "[f]rustration and appropriation are essentially different things." *Omnia Commercial Co. v. United States*, 261 U.S. 502, 513 (1923). White Oak "has done no more than [complain] that a prospective business opportunity was lost." *See United States v. Grand River Dam Auth.*, 363 U.S. 229, 236 (1960). Indeed, White Oak's owner could not identify any damage to White Oak outside a lost business opportunity. This is insufficient to establish a "taking" under the Fifth Amendment. *See Allain-Lebreton Co. v. Dep't of Army*, 670 F.2d 43, 45 (5th Cir. 1982) (finding no taking where "the company's complaint [was] that the Corps refuses to conduct its affairs so as to help the company develop its land").

Accordingly, the district court did not err in granting the Corps summary judgment on White Oak's takings claim.

---

mitigation would be required. Third, White Oak's theory would allow parties to avoid the WRDA's mitigation requirements by impacting the environment prior to receiving a Corps contract, even when that impact results from a clear intent to sell to the Corps. This would be contrary to Congress' intent that the Corps mitigate impacts resulting from Corps's projects. *See* 33 U.S.C. § 2316(a).

V. No error in declining to consider supplemental evidence.

Finally, White Oak urges us to consider the Corps's Comprehensive Environmental Document ("CED"), which was not part of the administrative record during summary judgment briefing, because, according to White Oak, the CED "is inconsistent with the decision to impose mitigation" on Idlewild. We decline to do so.

"When reviewing an agency action under the APA, we review 'the whole record or those parts of it cited by a party.'" *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010) (quoting 5 U.S.C. § 706). "Supplementation of the administrative record is not allowed unless the moving party demonstrates 'unusual circumstances justifying a departure' from the general presumption that review is limited to the record compiled by the agency." *Id.* (quoting *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)).

Neither party cites persuasive authority that evidence of an inconsistent agency decision is the type of "unusual circumstance" justifying supplementation. Nonetheless, we need not determine that issue. Even assuming that evidence of an inconsistent decision could justify supplementation, the district court correctly determined that the CED is not inconsistent with record evidence and adds nothing to the consideration of this case.

CONCLUSION

Having found no error in the district court's analysis, we AFFIRM in full.

[ENTERED: September 14, 2016]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WHITE OAK REALTY, LLC	**CIVIL ACTION**
VERSUS	**NO: 13–4761**
UNITED STATES ARMY CORP OF ENGINEERS, ET AL.	**SECTION "H"(3)**

ORDER AND REASONS

Before the Court are Cross-Motions for Summary Judgment (Docs. 100, 102). For the following reasons, summary judgment is granted in favor of Defendants.

BACKGROUND

This is a civil action for declaratory and injunctive relief. The plaintiffs are White Oak Realty, LLC and Citrus Realty, LLC. The defendants are the United States Corps of Engineers (the "Corps") and various Corps employees. The dispute involves mitigation requirements imposed by the Corps on a tract of land in Southeast Louisiana ("Idlewood Stage 2"), jointly owned by Plaintiffs.

In response to the devastation caused by Hurricanes Katrina and Rita, Congress authorized the Corps to undertake a series of projects collectively known as the Hurricane and Storm Damage Risk Reduction System ("HSDRRS"). One of these projects involves the use of soil and clay ("borrow material") to reinforce levees and floodwalls in the Gulf South. In order to respond to the

unprecedented amount of borrow material needed for this project, the Corps instituted the contractor-furnished borrow program. The contractor-furnished borrow program allows landowners to have their land pre-qualified as a suitable source for borrow material based on certain requirements.[1] These government-approved properties are then placed on a list for selection as supply sources by contractors working on the levee project. Contractors may then select a borrow supplier from that list, and the borrow is excavated for use on the Corps's projects.

At some point in 2010, Plaintiffs discovered the presence of borrow material on their property. They subsequently filed a "suitability determination" with the Corps to confirm the borrow material could be used in HSDRRS projects. Some of the property (Idlewild Stage 1) was quickly qualified and clay mining began. On other portions (Idlewild Stages 2 and 3), the Corps approved the land's use for borrow material but found that the excavation of borrow material would cause "unavoidable impacts" to the bottomland hardwood ("BLH") forests on the property, and therefore mitigation would be required. In addition, the portions of the land that were wetlands were excluded from excavation. Plaintiffs, therefore, sought to mine clay only from the uplands portions of Idlewild Stage 2 and that area was later cleared of the BLH forest.

In a letter dated November 4, 2010, the Corps notified Plaintiffs that Idlewood Stage 2 "appears to be acceptable for use as a source" of borrow material. The letter confirmed the preliminary report's

[1] Doc. 115-4, p. 12.

determination that excavation would harm the environment. The letter required "proof of mitigation to the Corps[] . . . prior to excavation." The Corps issued a similar letter on April 14, 2011, reaffirming the requirement that the impacts to the BLH forests on the land be mitigated. The letter informed Plaintiffs that their "compensatory mitigation requirements may be met" by obtaining credits from select mitigation banks.

Plaintiffs subsequently hired Mitigation Strategies, LLC ("Mitigation Strategies") hoping to convince the Corps of the "legal and factual errors underlying [its] mitigation requirements." Mitigation Strategies argued to the Corps on numerous occasions that mitigation was neither necessary nor appropriate under the law. In the alternative, if mitigation was required, Mitigation Strategies argued the law required in-kind mitigation, rather than the purchase of credits from mitigation banks.

The Corps disagreed. A February 20, 2013 letter from the District Commander reiterated the Corps's position that if borrow material from Idlewood Stage 2 is used in connection with the HSDRRS project, the impacts to the BLH forests on that land must be mitigated (the "Mitigation Requirement"). It further confirmed the Corps's position that such mitigation must occur through the purchase of mitigation bank credits (the "Purchase Requirement").

As a result of the Corps's position, Plaintiffs filed this suit, arguing that the Water Resource Development Act of 2007 ("WRDA"), 33 U.S.C. § 2201 et seq., does not require mitigation for Idlewood Stage 2 or alternatively, that the WRDA

does not authorize the Corps to mandate the purchase of mitigation credits as the sole form of compensatory mitigation. Plaintiffs also assert claims under the Takings Clause of the Fifth Amendment.[2] The parties have filed cross-motions for summary judgment on all of Plaintiffs' claims.

LEGAL STANDARD

"The [APA] allows a federal court to overturn an agency's ruling only if it is arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence on the record taken as a whole."[3] The Court begins with the "presumption that the agency's decision is valid, and the plaintiff has the burden to overcome that presumption by showing that the decision was erroneous."[4] The agency's factual findings will be upheld so long as they are supported by substantial evidence.[5] "The agency's legal conclusions are reviewed de novo, except for questions of statutory interpretation, where the court owes substantial deference to an agency's construction of a statute that it administers."[6]

The Court must also be mindful of the two-step process of judicial review of agency action

---

[2] Plaintiff's due process claims have previously been dismissed by this Court. Doc. 142.

[3] *Buffalo Marine Servs. Inc. v. U.S.*, 663 F.3d 750, 753 (5th Cir. 2011).

[4] *Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5th Cir. 2010).

[5] *Buffalo Marine Servs. Inc.*, 663 F.3d at 753.

[6] *Id.*

outlined in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[7] Pursuant to *Chevron*, a court reviewing an agency's construction of a statute must first ask "whether Congress has directly spoken to the precise question at issue."[8] If Congressional intent is clear, "that is the end of the matter."[9] If, however, the statute is silent or ambiguous with regard to the specific issue, the question then becomes whether agency action is "based on a permissible construction of the statute."[10] "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[11] Indeed, the Court cannot substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[12]

I. Jurisdiction

LAW AND ANALYSIS

At the outset, Defendants argue that this Court lacks jurisdiction under the APA to hear Plaintiffs' claims because no final agency action has

---

[7] 467 U.S. 837 (1984).

[8] *Id.* at 842.

[9] *Id.* at 843.

[10] *Id.* at 843–44.

[11] *Id.*

[12] *Id. at 844.*

taken place. Defendants originally propounded this argument in their Motion to Dismiss.[13] Under a Rule 12(b)(1) standard, this Court held that the Corps's February 20, 2013 letter constituted a final agency action.[14] Defendants have reurged this argument in their summary judgment motion and argue that Plaintiffs cannot carry the burden of proving that the February 20 letter was "rights-determining."

In order to be considered final, an agency action must (1) "mark the consummation of the agency's decision-making process," and (2) "be one by which rights or obligations have been determined, or from which legal consequences will flow."[15] Defendants contend that Plaintiffs cannot meet the second prong because the February 20 letter merely states the Corps's opinions on the borrow program requirements and the legal authority upon which it relies. Defendants heavily on the Fifth Circuit's opinion in *Belle Co. v. US Army Corp*, which states that a jurisdictional determination that the plaintiff's property contained wetlands was not a final determination because the plaintiff had an array of alternatives to choose from and was not required to act in any particular way.[16] After

---

[13] Doc. 32.

[14] Doc. 42.

[15] *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997).

[16] *Belle Co. v. U.S. Army Corps of Engineers*, 761 F.3d 383 (5th Cir. 2014), cert. denied sub nom. *Kent Recycling Servs., LLC v. U.S. Army Corps of Engineers*, 135 S. Ct. 1548 (2015), reh'g granted, order vacated, 136 S. Ct. 2427 (2016), and cert. granted, judgment vacated sub nom. *Kent Recycling Servs., LLC v. U.S. Army Corps of Engineers*, 136 S. Ct. 2427 (2016).

Defendants filed their motion, however, the Supreme Court reversed and remanded *Belle* for further consideration in light of *Army Corp v. Hawkes Co*.[17] In *Hawkes*, the Supreme Court held that a jurisdictional determination that a particular piece of property contains "waters of the United States" and is subject to the Clean Water Act is a final agency action.[18] It stated that "[t]he definitive nature of the approved [jurisdictional determination] . . . gives rise to 'direct and appreciable legal consequences.'"[19] Despite this, Defendants subsisted at oral argument in their belief that no final agency action has occurred in this case, and this Court ordered supplemental briefing.

In their supplemental briefing, Defendants argue that the February 20, 2013 letter at issue here differs from the jurisdictional determination in *Hawkes* and therefore does not amount to a final agency action. Defendants argue that the letter "requires nothing of [Plaintiffs] and they are free to do as they choose with the property."[20] Defendants' argument, however, ignores the Court's analysis in *Hawkes*, which states that a jurisdictional determination declaring property as wetlands is a final agency action because it results in legal consequences, namely the loss of the five year safe harbor. This is true despite the fact that such a

---

[17] *Kent Recycling Servs., LLC v. U.S. Army Corps of Engineers*, 136 S. Ct. 2427 (2016).

[18] *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016).

[19] *Id.*

[20] Doc. 165.

declaration does not require the property owner "to do or refrain from doing anything to its property."[21] It simply notifies the property owner that a permit will be required prior to taking certain actions on the property.[22] Indeed, just as in *Hawkes*, the letter at issue here does not require the Plaintiffs to do or refrain from doing anything but merely requires that they show proof of mitigation prior to supplying borrow material to the Corps. This requirement is a "direct and appreciable legal consequence" for Plaintiffs under the analysis set forth in *Hawkes*. In addition, Defendants have not identified an alternative route by which Plaintiffs could have the Corps's action reviewed. Accordingly, this Court holds that the February 20, 2013 letter constitutes a final agency action, and this Court therefore has jurisdiction to hear Plaintiffs' claims.

II. The Mitigation Requirement

The Court next considers Plaintiffs' argument that the Corps's Mitigation Requirement conflicts with the plain language of the WRDA. Under *Chevron*, this Court must first consider "whether Congress has directly spoken to the precise question at issue"—that is, whether the Corps can require mitigation for the loss of BLH forests on property from which contractor-supplied borrow material is excavated for use in a Corps project. Plaintiffs allege that the WRDA does not require mitigation for impacts that do not directly result from a water resource project. Specifically, Plaintiffs allege that the WRDA is intended to address only those

---

[21] *Belle Co.*, 761 F.3d at 391.

[22] *Id.*

environmental impacts that directly result from a water resource project—such as those impacts sustained by the land on which a levee is erected—and not those that result indirectly—such as those sustained by land from which borrow material is taken for use on the levee. Plaintiffs argue that requiring mitigation for indirect impacts is inconsistent with the statutory plan set forth by the WRDA.

First, Plaintiffs argue that the WRDA requires the Corps to assess potential environmental impacts in advance of a project and plan for mitigation of those impacts.[23] Indeed, 33 U.S.C. § 2283(d)(1) states that a proposal for a water resources project must contain "a recommendation with a specific plan to mitigate for damages to ecological resources, including terrestrial and aquatic resources, and fish and wildlife losses created by such project." Plaintiffs argue that the Mitigation Requirement conflicts with this mandate because Defendants are unable to assess and plan for the impacts resulting from the excavation of contractor-furnished borrow material until the contractor selects a borrow supplier. Because it is not known at the outset which suppliers will be selected and the environmental impact of extracting borrow material from the land owned by those suppliers, the Corps cannot plan to mitigate those impacts in advance. Plaintiffs argue that the total project impact will not be known before the project is begun, making it impossible to comply with the proposal requirements of 33 U.S.C. § 2283(d).

---

[23] *See* 33 U.S.C. § 2283(d).

Second, Plaintiffs argue that the Mitigation Requirement conflicts with the WRDA's requirement that mitigation must occur before construction begins on the project (and therefore before the impact has occurred). Indeed, the WRDA states that mitigation "shall be undertaken or acquired before any construction of the project . . . commences, or [] shall be undertaken or acquired concurrently with lands and interests in lands for project purposes (other than mitigation of fish and wildlife losses.)"[24] Plaintiffs argue that the Mitigation Requirement is inconsistent with the WRDA because it does not require mitigation prior to construction, but rather, only requires that mitigation occur before borrow is excavated from a supplier's land. In addition, mitigation is only required if a supplier is selected to provide borrow for the project. However, the impact—the destruction of BLH forests—may have, as here, long predated the mitigation.

Finally, Plaintiffs argue that the Mitigation Requirement conflicts with the WRDA's budget requirements. Pursuant to 33 U.S.C. § 2283, costs of mitigation must be accounted for in the project budget. Plaintiffs contend that the Mitigation Requirement allows the Corps to shift these costs to private contractors and suppliers and circumvent their inclusion in the project budget.

In response to Plaintiffs' argument that the Mitigation Requirement is inconsistent with the prior planning, budgeting, and mitigating requirements of the WRDA, Defendants point to the plain language of the WRDA, which states that the

---

[24] 33 U.S.C. § 2283(a).

Corps must mitigate for losses "resulting from any water resources project" or "created by such project." Indeed, the WRDA, does not address a distinction between "direct" and "indirect" impacts, as Plaintiffs have coined them. Based on the plain language of the WRDA, Defendants argue that the Corps's determination that impacts to borrow sites resulting from levee construction must be mitigated is per se reasonable and rationally based. They argue that this provision is unambiguous and thus entitled to deference under *Chevron* step one.

In assessing both of the parties' arguments, it is clear to this Court that the WRDA is ambiguous as to whether the Corps can require mitigation for the loss of BLH forests on property from which contractor-supplied borrow material is excavated for use in building levees as part of the HSDRRS project. While the plain language of the statute seems to indicate that all impacts must be mitigated, Plaintiffs point to some of the statute's requirements that may be inconsistent with such a rule. For instance, the WRDA could be read, as Plaintiffs have, to require that the Corps submit a proposal and budget for the mitigation of all impacts of a water resources project at the time authorization is sought for that project.[25] If the WRDA mandates such a comprehensive proposal, then the Mitigation Requirement, through which the extent of mitigation required is not determined until a supplier is selected by a contractor, would be inconsistent with this mandate.

---

[25] *See* 33 U.S.C. § 2283(d)(1).

Having found that the WRDA is ambiguous as to the precise question at issue, this Court must move to *Chevron* Step Two and determine "whether the agency's answer is based on a permissible construction of the statute." This Court holds that it is.

As Plaintiffs point out, "[t]he WRDA statutory scheme contemplates that the Corps, not private parties, will be conducting mitigation."[26] Typically if borrow is required for a Corps project, the Corps will acquire a borrow site and pay just compensation to the owner.[27] The Corps then mitigates for impacts caused by excavation on the land that it has acquired. That said, the aftermath of Hurricane Katrina was not a typical situation. The project of reinforcing the levees and floodwalls in the New Orleans area, which required an "unprecedented amount of borrow material," was undertaken on an expedited schedule "in light of the risk posed to the area by an unfinished system."[28] "In order to facilitate the use of vast amounts of borrow material needed to construct the [HSDRRS], [the Corps] determined that it was in the best interest of the Government for certain construction contracts to require the contractor to furnish its own borrow material."[29] The Corps therefore instituted the contractor-furnished borrow program, a shift from usual protocol.

---

[26] Doc. 111.

[27] Doc. 102-1.

[28] Doc 102-1.

[29] Doc. 115-17, p. 19.

While the contractor-furnished borrow program may differ from the typical process in which borrow is furnished by the government, the end result is the same—borrow is excavated from land for use on a Corps project. That said, this Court can see no policy reason why mitigation should not still be required. "Plaintiffs do not contest that the Corps must mitigate for impacts caused by the Corps's own borrow excavation in the government-furnished borrow program, or elsewhere."[30] The Corps cannot then bypass this obligation by using contractor-furnished borrow instead. Such a holding would be counter to the policy espoused by the WRDA.

Policy arguments aside, the Mitigation Requirement is a reasonable interpretation of the WRDA. The WRDA plainly states that the Corps is required to mitigate for any impacts "resulting from" or "created by" a water resources project such as the HSDRRS. Plaintiffs admit that the impacts created on land from which government-furnished borrow is excavated are project impacts that must be mitigated. It necessarily follows, then, that impacts created on the land from which contractor-furnished borrow is excavated are project impacts as well. Each are effects on the land from which borrow is removed for a Corps's project. The WRDA does not differentiate between impacts that are created on land owned by the government or otherwise. This Court finds that the Corps was reasonable in reaching this conclusion and requiring mitigation of the impacts to BLH on these sites, especially in light of the substantial deference owed to an agency's construction of a statute under its administration.

---

[30] Doc 111, p. 3.

Accordingly, this Court holds that the Corps's imposition of the Mitigation Requirement is based on a permissible construction of the statute and does not violate the WRDA.

III. The Purchase Requirement

Having held that the Mitigation Requirement complies with the WRDA, this Court must now address Plaintiffs' arguments regarding the Purchase Requirement, which mandates that the only way to satisfy the Mitigation Requirement is to purchase mitigation bank credits. The question at issue here is whether the Corps can require the purchase of wetland mitigation credits as the sole option for satisfying the Mitigation Requirement. Plaintiffs argue that this requirement is arbitrary and capricious.

The WRDA speaks expressly to the mitigation of BLH forests, stating that "mitigation plans shall ensure that impacts to bottomland hardwood forests are mitigated in-kind, and other habitat types are mitigated to not less than in-kind conditions, to the extent possible."[31] In-kind mitigation of the impacts to upland BLH forests requires the purchase of upland mitigation credits from the same region or an alternative mitigation plan addressing upland BLH forests. Instead, the Corps has required Plaintiffs to purchase credits from a *wetland* mitigation bank in the same region.

At oral argument, the parties agreed there are no upland BLH mitigation credits available to purchase in the region at issue. In addition, the

[31] *See* 33 U.S.C. § 2283(d).

record reveals that the Corps felt that consideration of individual mitigation projects would be less efficient, timely, and effective than requiring the purchase of credits. The Corps explained that "[t]he creation and approval of a mitigation plan . . . is a lengthy and detailed process that can take a year or more. . . . Not only does the [Corps] not have the manpower to devote to this process for every contractor-furnished borrow site, but it would significantly delay the approval and use of those sites."[32] As previously discussed, the HSDRRS was undertaken on an expedited basis, and the Corps did not feel it had time to consider individual mitigation plans. "The advantage of mitigation banks is that they have already been approved and credits are readily available."[33] Accordingly, for all intents and purposes, mitigation in-kind was not possible, and the Corps resorted to the next most applicable form of mitigation—wetland BLH mitigation bank credits from the same region. This decision was not arbitrary and capricious, but rather, was in line with "the objective of ensuring that Risk Reduction System projects are expeditiously built to protect the residents of Greater New Orleans."[34]

In addition, Corps regulations reveal a preference for mitigation through mitigation bank credits.[35] The regulations reveal that bank credits are preferred for several reasons: (1) they can "help reduce risk and uncertainty;" (2) they can "help reduce risk

---

[32] Doc. 115-17, p. 19–20.

[33] *Id.*

[34] Doc. 106.

[35] 33 C.F.R. § 332.3; *see also* 33 U.S.C. § 2317b.

that mitigation will not be fully successful;" (3) they "typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation;" (4) they require "site identification in advance, project-specific planning, and significant investment of financial resources that is often not practicable for many in-lieu fee programs."[36] Indeed, the Corps admits that pursuant to the WRDA it is ultimately responsible for ensuring that mitigation is completed. Requiring the purchase of mitigation credits, then, eliminates the possibility that the Corps will be required to step in to complete a mitigation project or that mitigation will go unfinished.

Finally, Plaintiffs make much ado about the Corps's requirement that they pay for mitigation, arguing that it is the Corps's responsibility to pay for and undertake mitigation. Indeed, this Court agrees that the ultimate responsibility for mitigation lies with the Corps. The Mitigation and Purchase Requirements put the initial onus on the landowner or contractor to foot the bill for the mitigation credits, but the cost will ultimately lie with the Corps. As the mitigation credits increase the contractors' expenses, so too will the amount it charges the Corps for those services increase. This Court does not find then that the Corps has, as Plaintiffs put it, attempted to shift its responsibilities under the WRDA by implementing the Mitigation and Purchase Requirements.

---

[36] 33 C.F.R. § 332.3(b)(2).

For all of the foregoing reasons, this Court holds that the Purchase Requirement is in line with the plain language of the WRDA and is a reasonable interpretation thereof. The Corps was not arbitrary or capricious in requiring the purchase of mitigation credits to satisfy the Mitigation Requirement.

IV. Takings Claim

Finally, Plaintiffs allege the Corps's actions constitute a taking. The Takings Clause of the Fifth Amendment prohibits the government from taking private property for public use without just compensation.[37] Plaintiffs allege that the Mitigation and Purcahse Requirements amount to takings under the analysis set forth in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), because the Corps has "commanded that Plaintiffs relinquish funds in order to use their property in a particular way." Plaintiffs seek a declaratory judgment that "the Corps's actions violate the Takings Clause of the Constitution's Fifth Amendment" and an injunction allowing Plaintiffs to forgo the Corps's Mitigation Requirement.[38]

In response, Defendants argue that the takings cases cited by Plaintiffs are inapplicable

---

[37] U.S. Const. amend. V, cl.4. The purpose of the Takings Clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

[38] Doc. 31, p. 30.

here.[39] Defendants point out that *Nollan*, *Dolan*, and *Koontz* each consider whether the conditions of a land use permit amount to a taking. Unlike these cases, Plaintiffs' land is not subject to any regulatory action or land-use permit, but instead, the Mitigation and Purchase Requirements are obligations set forth in the Corps's contracts with levee contractors. Defendants argue that, therefore, this line of cases and the *per se* takings analysis used therein are inapplicable. Plaintiffs rebut that the Mitigation and Purchase Requirements are regulatory despite being imposed through a contract because they implicate the sovereign interest of the federal government and its public policy. Plaintiffs contend that the Mitigation and Purchase Requirements are regulatory actions subject to a *per se* takings analysis.

In support of their position, Plaintiffs point to cases discussing whether a law is regulatory or proprietary as part of a federal preemption analysis.[40] While these cases provide some helpful

---

[39] Defendants also propound jurisdictional arguments already rejected by this Court. Doc. 142.

[40] *See Se. Louisiana Bldg. & Const. Trades Council, AFL-CIO v. Louisiana ex rel. Jindal*, 107 F. Supp. 3d 584, 597–603 (E.D. La. 2015) (discussing whether a state law prohibiting project labor agreements was proprietary or regulatory and thus subject to preemption by the NLRA); *Bldg. & Const. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 36 (D.C. Cir. 2002) (discussing whether an executive order that that provided that no federal agency could require bidders for a construction contract to enter into a project labor agreement was regulatory or proprietary and thus preempted by the NLRA); *Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Tex.*, 180 F.3d 686, 696 (5th Cir. 1999) (discussing

language regarding whether the government's actions are proprietary or regulatory, none address the question at hand.[41] The issue is whether the *per se* takings analysis used in *Dolan*, *Nollan*, and *Koontz* should be extended to apply to conditions set forth by contract, rather than in land use permits. Plaintiffs have not provided this Court with any case using a *per se* takings analysis when the condition at issue was contractual. Accordingly, this Court declines to extend the *per se* takings analysis to this matter.

Even assuming, however, that the *per se* takings analysis applied here, Plaintiffs could not succeed on their takings claim regarding the Mitigation Requirement. In *Koontz*, the Supreme Court held that a monetary exaction for mitigation as a condition of a land use permit must have an essential nexus and rough proportionality to the impacts of the proposed development.[42] Regulations lacking a nexus and proportionality will be considered takings. Plaintiffs argue that the Mitigation Requirement cannot satisfy this test because the BLH forests on Idlewild Stage 2 were cut down years ago. "The requirement that those

---

whether a towing ordinance was proprietary or regulatory and thus preempted by federal law).

[41] *See Allbaugh*, 295 F.3d at 36 ("A condition that the Government imposes in awarding a contract or in funding a project is regulatory only when, as the Supreme Court explained in *Boston Harbor*, it 'addresse[s] employer conduct unrelated to the employer's performance of contractual obligations to the [Government].'").

[42] *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2599 (2013).

trees now be replaced is not sufficiently related to the excavation of clay for HSDRRS use because the trees are gone whether Plaintiffs excavate and sell clay to the Corps or not.[43] This Court finds, however, that Plaintiffs removed the trees at issue after their land had been approved for use in the contractor-furnished borrow program and the Mitigation Requirement had been instituted. Plaintiffs therefore ask this Court to find that the Mitigation Requirement constitutes a taking by looking to events that occurred after its announcement. Plaintiffs cannot convert the Mitigation Requirement into a taking by their own unilateral acts. Such a holding would lead to absurd results, in which parties subject to mitigation requirements could simply destroy the valued resources to avoid mitigating their loss. This Court holds that the Mitigation Requirement has the essential nexus and proportionality to the impacts on the BLH forests on Idlewild Stage 2. The requirement requires mitigation as mandated by the WRDA for only those portions of BLH that are affected by the excavation of borrow material for use on the HSDRRS project. The WRDA communicates the government's clear interest in protecting BLH forests. Accordingly, Plaintiffs would not succeed on their *per se* takings claim even if such analysis applies in these circumstances.

CONCLUSION

For the foregoing reasons, summary judgment is granted in favor of Defendants. Plaintiffs' APA and *per se* takings claims are dismissed with

[43] Doc 100-1, p. 43.

prejudice. The only remaining claim is Plaintiffs' regulatory takings claim.

New Orleans, Louisiana, this 14th day of September, 2016.

/s/
JANE TRICHE MILAZZO
UNITED STATES DISTRICT JUDGE

[ENTERED: March 28, 2017]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WHITE OAK REALTY, LLC	**CIVIL ACTION**
VERSUS	**NO: 13–4761**
UNITED STATES ARMY CORP OF ENGINEERS, ET AL.	**SECTION "H"(3)**

ORDER AND REASONS

Before the Court is Defendants' Motion for Summary Judgment (Doc. 185). For the following reasons, the Motion is GRANTED.

BACKGROUND

This is a civil action for declaratory and injunctive relief. The plaintiffs are White Oak Realty, LLC and Citrus Realty, LLC. The defendants are the United States Corps of Engineers (the "Corps") and various Corps employees. The dispute involves mitigation requirements imposed by the Corps on a tract of land in Southeast Louisiana ("Idlewood Stage 2"), jointly owned by Plaintiffs.

In response to the devastation caused by Hurricanes Katrina and Rita, Congress authorized the Corps to undertake a series of projects collectively known as the Hurricane and Storm Damage Risk Reduction System ("HSDRRS"). One of these projects involves the use of soil and clay ("borrow material") to reinforce levees and floodwalls in the Gulf South. In order to respond to the unprecedented amount of borrow material needed

for this project, the Corps instituted the contractor-furnished borrow program. The contractor-furnished borrow program allows landowners to have their land pre-qualified as a suitable source for borrow material based on certain requirements.[1] These government-approved properties are then placed on a list for selection as supply sources by contractors working on the levee project. Contractors may then select a borrow supplier from that list, and the borrow is excavated for use on the Corps's projects.

At some point in 2010, Plaintiffs discovered the presence of borrow material on their property. They subsequently filed a "suitability determination" with the Corps to confirm the borrow material could be used in HSDRRS projects. Some of the property (Idlewild Stage 1) was quickly qualified and clay mining began. On other portions (Idlewild Stages 2 and 3), the Corps approved the land's use for borrow material but found that the excavation of borrow material would cause "unavoidable impacts" to the bottomland hardwood ("BLH") forests on the property, and therefore mitigation would be required. In addition, the portions of the land that were wetlands were excluded from excavation. Plaintiffs, therefore, sought to mine clay only from the uplands portions of Idlewild Stage 2 and that area was later cleared of the BLH forest.

In a letter dated November 4, 2010, the Corps notified Plaintiffs that Idlewood Stage 2 "appears to be acceptable for use as a source" of borrow material. The letter confirmed the preliminary report's determination that excavation would harm the

[1] Doc. 115-4, p. 12.

environment. The letter required "proof of mitigation to the Corps[] . . . prior to excavation." The Corps issued a similar letter on April 14, 2011, reaffirming the requirement that the impacts to the BLH forests on the land be mitigated. The letter informed Plaintiffs that their "compensatory mitigation requirements may be met" by obtaining credits from select mitigation banks.

Plaintiffs subsequently hired Mitigation Strategies, LLC ("Mitigation Strategies") hoping to convince the Corps of the "legal and factual errors underlying [its] mitigation requirements." Mitigation Strategies argued to the Corps on numerous occasions that mitigation was neither necessary nor appropriate under the law. In the alternative, if mitigation was required, Mitigation Strategies argued the law required in-kind mitigation, rather than the purchase of credits from mitigation banks.

The Corps disagreed. A February 20, 2013 letter from the District Commander reiterated the Corps's position that if borrow material from Idlewood Stage 2 is used in connection with the HSDRRS project, the impacts to the BLH forests on that land must be mitigated (the "Mitigation Requirement"). It further confirmed the Corps's position that such mitigation must occur through the purchase of mitigation bank credits (the "Purchase Requirement").

As a result of the Corps's position, Plaintiffs filed this suit, arguing that the Water Resource Development Act of 2007 ("WRDA"), 33 U.S.C. § 2201 et seq., does not require mitigation for Idlewood Stage 2 or alternatively, that the WRDA does not authorize the Corps to mandate the

purchase of mitigation credits as the sole form of compensatory mitigation. This Court has previously dismissed all of Plaintiff's claims on summary judgment, save a regulatory takings claim. Defendant has filed the instant Motion for Summary Judgment seeking dismissal of that remaining claim.

LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[2] A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[3]

In determining whether the movant is entitled to summary judgment, the Court views facts in the light most favorable to the non-movant and draws all reasonable inferences in his favor.[4] "If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial."[5] Summary judgment is

---

[2] Fed. R. Civ. P. 56(c) (2012).

[3] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[4] *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 532 (5th Cir. 1997).

[5] *Engstrom v. First Nat'l Bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir. 1995).

appropriate if the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case."[6] "In response to a properly supported motion for summary judgment, the non-movant must identify specific evidence in the record and articulate the manner in which that evidence supports that party's claim, and such evidence must be sufficient to sustain a finding in favor of the non-movant on all issues as to which the non- movant would bear the burden of proof at trial."[7] "We do not . . . in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts."[8] Additionally, "[t]he mere argued existence of a factual dispute will not defeat an otherwise properly supported motion."[9]

LAW AND ANALYSIS

I. Procedural History

As a threshold matter, Plaintiffs dispute the appropriateness of considering Defendants' second motion for summary judgment. They argue that Defendants' motion is improper under the scheduling order and should be considered under the standard of a motion for reconsideration.

---

[6] *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

[7] *John v. Deep E. Tex. Reg. Narcotics Trafficking Task Force*, 379 F.3d 293, 301 (5th Cir. 2004) (internal citations omitted).

[8] *Badon v. R J R Nabisco, Inc.*, 224 F.3d 382, 394 (5th Cir. 2000) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)).

[9] *Boudreaux v. Banctec, Inc.*, 366 F. Supp. 2d 425, 430 (E.D. La. 2005).

This case has followed an unusual procedure. Initially, the Court set a scheduling order establishing a trial date, as well as a deadline for non- evidentiary pre-trial motions. After the parties filed a motion for judgment on the pleadings and cross-motions for summary judgment, however, the Court vacated the scheduling order pending resolution thereof.[10] The parties moved for summary judgment on all claims except the regulatory taking claim at issue herein. The Court granted summary judgment in Defendants' favor and dismissed all of Plaintiffs' claims, save their regulatory takings claim. Thereafter, a scheduling conference was held to select a trial date upon which to try Plaintiffs' remaining claim. In addition to a trial date, the Court set a new discovery deadline and pre-trial motion deadline as well. Thereafter, the parties conducted discovery, and Defendants filed the instant motion for summary judgment within the deadline set by the Court.[11] Defendants argue that the deposition testimony obtained after their first motion for summary judgment was important in making their arguments in the instant motion.

"Courts have found that a subsequent summary judgment motion based on an expanded record is permissible."[12] The Fifth Circuit has stated that such a determination is in the district court's discretion.[13] "That discretion may be exercised

---

[10] Doc. 140.

[11] Defendants requested a one week extension from the date originally set in the scheduling order. Doc. 178.

[12] *Enlow v. Tishomingo Cty., Miss.*, 962 F.2d 501, 506 (5th Cir. 1992).

[13] *Id.*

whether or not new evidence is submitted with the subsequent motion."[14] This Court, therefore, finds it appropriate to allow Defendants' successive summary judgment motion. Defendants move for summary judgment on a claim not yet addressed by this Court after additional discovery and within the deadlines set by the Court's revised scheduling order. It is in the interest of efficiency to review Defendants' motion in lieu of proceeding directly to a potentially unnecessary trial. Accordingly, this Court rejects Plaintiffs' procedural objections and proceeds to the merits of Defendants' motion.

II. Defendants' Arguments for Dismissal

The Fifth Amendment of the Constitution prohibits the government from taking private property without just compensation. "A 'taking'" may occur either by physical invasion or by regulation."[15] In Plaintiffs' remaining claim, they assert that the Purchase Requirement constitutes a regulatory taking. Plaintiffs seek equitable relief—namely, exclusion from the Purchase Requirement. Under the Supreme Court's decision in *Penn Central Transportation Co. v. City of New York*, three key factors' guide the regulatory taking analysis: "(1) the economic impact on the claimant; (2) the extent of interference with the claimant's investment-backed expectations; and (3) the character of the government's

---

[14] *Johnson v. PPI Tech. Servs., L.P.*, 605 F. App'x 366, 367 (5th Cir. 2015).

[15] *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1328 (Fed. Cir. 2012).

action."[16] "The Fifth Circuit has explained that '[i]n order for regulatory action to rise to the level of an unconstitutional taking, there must be a complete deprivation of the owner's economically viable use of his property.'"[17] Before a takings claim can be considered, however, a court must determine whether the plaintiff holds a property interest that is protected by the Fifth Amendment.[18] Defendants allege that Plaintiffs cannot succeed on their regulatory takings claim either because this Court lacks jurisdiction over the claim or because Plaintiffs lack a compensable property interest in the property allegedly taken. This Court will consider each argument in turn.

A. Jurisdiction

At the outset, Defendants reassert many of the arguments previously made in their Motion for Judgment on the Pleadings alleging that this Court lacks jurisdiction to hear Plaintiffs' takings claim. Defendants argue that Congress has not withdrawn Tucker Act jurisdiction over Plaintiffs' claims, and thus Plaintiffs' claims should be brought in the United States Court of Federal Claims. This Court has already addressed these arguments, and Defendants' renewed objection to jurisdiction does not dissuade this Court from its prior holding.

---

[16] *Hackbelt 27 Partners, L.P. v. City of Coppell*, 661 F. App'x 843, 850 (5th Cir. 2016).

[17] *Laredo Rd. Co. v. Maverick Cty., Texas*, 389 F. Supp. 2d 729, 739 (W.D. Tex. 2005) (quoting *Matagorda County v. Russell Law*, 19 F.3d 215, 223 (5th Cir. 1994)).

[18] *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984).

Accordingly, this Court again holds that it has jurisdiction to hear Plaintiffs' takings claims for the reasons stated in Record Document 142.

B. Compensable Property Interest

Next, Defendants argue that Plaintiffs lack a compensable property interest in the property that they allege was taken. At the outset, the parties dispute the nature of Plaintiffs' takings claim. Defendants characterize Plaintiffs' claim as alleging a taking of the clay itself as well as the business opportunity to sell the clay as part of the HSDRRS project. They argue that Plaintiffs' ownership of Idlewild Stage 2 does not give them a right to insist that their clay be purchased by the Corps, to demand they be exempt from the Purchase Requirement, or to dictate the terms of the Corps's contracts.

Plaintiffs, on the other hand, characterize their claim as one for a loss of rights in an existing asset. They argue that their right to mine the borrow material from Idlewild Stage 2 is inherent in their interest in the property and that the Purchase Requirement destroyed the right to realize profits from that material. Plaintiffs argue that ownership "means that a landowner has the right to exercise those property rights that are inherent in ownership, such as mining and realizing the value of sub-surface minerals, and it is that interest that Defendants have destroyed in this case."

"Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent

source such as state law."[19] In order to identify the "existing rules," a court must identify "the group of rights" inhering to a party's relation to a physical thing.[20]

> [U]nder Louisiana law, the essential features of the "bundle of rights" commonly characterized as "property" are: (1) usus—the right to use or possess, i.e., hold, occupy, and utilize the property; (2) abusus—the right to abuse or alienate, i.e., transfer, lease, and encumber the property, and (3) fructus—the right to the fruits, i.e., to receive and enjoy the earnings, profits, rents, and revenues produced by or derived from the property.[21]

Under Louisiana law, the borrow material on Idlewild Stage 2 is a "product." Products are things the production of which result in the diminution of the property.[22] Products belong to the owner of the property.[23] The Court therefore agrees that Plaintiffs have a right to and interest in the products of Idlewild Stage 2—that is, they have a right to receive earnings from the borrow material derived from the property. The Purchase Requirement, however, does not destroy Plaintiffs' right to the

---

[19] *Id.*

[20] *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 269 (5th Cir. 2012).

[21] *Id.*

[22] La. Civ. Code art. 488.

[23] *Id.*

products of the land as Plaintiffs allege. The requirement does not affect their right to mine and sell the borrow material on their property. Rather, Defendants' characterization is more fitting—the Purchase Requirement resulted in the taking of a business opportunity. Specifically, the Purchase Requirement lessened the value of the sale of the borrow material for use on the HSDRRS project. The law is clear that such is not a compensable property interest. "The sovereign must only pay for what it takes, not an opportunity the owner loses."[24]

In *Hearts Bluff Game Ranch v. U.S.*, the plaintiff alleged a taking when the Corps denied it a permit to create a mitigation bank on its property.[25] The Federal Circuit Court held that the plaintiff did not have a compensable property right in obtaining a mitigation bank permit.[26] It stated that even without the permit, the plaintiff was "still able to sell, assign, or transfer the land, or exclude others from its use, as it always was able to do."[27] The court went on to say that it has "rejected claims of a cognizable property interest in government programs where the government has discretionary authority to deny access to that program."[28]

In *Schooner Harbor Ventures, Inc. v. U.S.*, the plaintiff alleged a takings claim when it was

---

[24] *Allain-Lebreton Co. v. Dep't of Army, New Orleans Dist., Corps of Engineers*, 670 F.2d 43, 45 (5th Cir. 1982).

[25] *Hearts Bluff Game Ranch, Inc.*, 669 F.3d at 1328.

[26] *Id.* at 1331–32.

[27] *Id.* at 1331.

[28] *Id.*

required to give seventy-seven acres of property to the Fish and Wildlife Service ("FWS") to be used as a wildlife refuge in order to sell another parcel of land to the U.S. Navy.[29] The plaintiff alleged that "it could not sell to the Navy without meeting the Navy's conditions, and that FWS's determination of the scope of those conditions constitutes a taking."[30] The Federal Circuit Court agreed with the lower court's decision that the plaintiff did not have a compensable right to sell its property to the United States without any conditions imposed upon the sale.[31] It noted that the conditions did not attempt to limit to whom plaintiff sold the property. "[T]he only possible direct limitation on its right of alienation was . . . the inability to sell [to the Navy] without conditions."[32]

As in these cases, here, the only limitation on Plaintiffs' right to sell the borrow material on its property is the condition that it is required to purchase mitigation credits if the borrow will be used in the HSDRRS project. The imposition of this condition is in the Corps's sole discretion, and it does not destroy any of the "bundle of rights" that Plaintiffs have in owning the land. Plaintiffs are still entitled to mine and sell the borrow material on their property. Accordingly, Plaintiffs do not have a

---

[29] *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359, 1361 (Fed. Cir. 2009).

[30] *Id.* at 1364.

[31] *Id.* The court went on to say that the district court erred in not focusing on the plaintiff's right to develop its land without restriction.

[32] *Id.*

compensable property interest in selling their borrow material for use in the HSDRRS without satisfying the Purchase Requirement.[33] They therefore cannot succeed on their regulatory takings claim, and the claim must be dismissed.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment is GRANTED, and Plaintiffs' claims are DISMISSED WITH PREJUDICE.

New Orleans, Louisiana, this 28th day of March, 2017.

/s/
JANE TRICHE MILAZZO
UNITED STATES DISTRICT JUDGE

[33] Defendants also argued that Plaintiffs did not even own the borrow material on Idlewild Stage 2 at the time of the alleged taking. However, in light of its holding, this Court need not address this argument.

[ENTERED: December 11, 2013]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

WHITE OAK REALTY LLC, and CITRUS REALTY, LLC,	)	
Plaintiffs,	)	CIVIL ACTION NO. 13-04761
v.	)	
UNITED STATES ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL THOMAS P. BOSTICK, United States Army Chief of Engineers, in his official capacity; MAJOR GENERAL JOHN W. PEABODY, Commander, Mississippi Valley Division, United States Army Corps of Engineers, in his official capacity; and COLONEL RICHARD L. HANSEN, Commander, News Orleans District, United States Army Corps of Engineers, in his official capacity,	)	JUDGE JANE TRICHE MILAZZO MAGISTRATE DANIEL E. KNOWLES, III
Defendants.	)	

ORDER GRANTING PLAINTIFFS' UNOPPOSED MOTION TO AMEND COMPLAINT

For good cause shown and in the interests of justice, Plaintiffs White Oak Realty, LLC and Citrus Realty, LLC's Consent Motion to Amend Complaint is hereby **GRANTED.** Plaintiffs shall file their Second Amended Complaint (in the exact form attached to their Motion) within seven (7) days of the entry of this Order.

Pursuant to the agreement of all parties:

(1) Defendants will file their renewed Motion to Dismiss within the time period set forth in Federal Rule of Civil Procedure 15(a);

(2) Plaintiffs will respond to Defendants' renewed Motion to Dismiss in the time period set forth in LR 7.5; and

(3) The currently scheduled oral argument date of March 5, 2014 will remain as previously ordered.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss (R. Doc. 25) is **DENIED WITHOUT PREJUDICE.**

Signed this 11th day of December, 2013.

/s/
United States District Judge
Jane Triche Milazzo

[ENTERED: September 4, 2014]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WHITE OAK REALTY, LLC	**CIVIL ACTION**
VERSUS	**NO: 13–4761**
UNITED STATES ARMY CORP OF ENGINEERS, ET AL.	**SECTION "H"(3)**

ORDER AND REASONS

Before the Court is a Motion to Dismiss or Alternatively for a More Definite Statement.[1] For the following reasons, the Motion is DENIED.

BACKGROUND[2]

This is a civil action for declaratory and injunctive relief. The plaintiffs are White Oak Realty, LLC and Citrus Realty, LLC. The defendants are the United States Corps of Engineers (the "Corps") and various Corps employees. The dispute involves mitigation requirements imposed by the Corps on a tract of land in Southeast Louisiana ("Idlewood Stage 2") jointly owned by Plaintiffs.

In response to the devastation caused by Hurricanes Katrina and Rita, Congress authorized the Corps to undertake a series of projects collectively known as the Hurricane and Storm Damage Risk Reduction System ("HSDRRS"). One

---

[1] R. Doc. 32.

[2] The following facts are drawn primarily from the second amended complaint. *See generally* R. Doc. 31.

of these projects involves the use of soil and clay ("borrow material") to reinforce levees and floodwalls in the Gulf South. Under the applicable statutes and regulations, the Corps determines whether a particular location is a suitable source of borrow material and if so whether mitigation of losses to fish and wildlife is necessary.[3]

At some point in 2010, Plaintiffs discovered the presence of borrow material in Idlewood Stage 2.[4] They subsequently filed a "suitability determination" with the Corps to confirm the borrow material could be used in HSDRRS projects. In October 2010, the Corps issued a preliminary report approving the use of borrow material from Idlewood Stage 2 and nine other sites.[5] The report found that the excavation of borrow material from Idlewood Stage 2 would cause "unavoidable impacts" to the environment.[6] Accordingly, if Idlewood Stage 2 were ultimately approved for HSDRRS projects, the landowner or contractor would be required to provide compensatory mitigation prior to excavation by purchasing credits from a mitigation bank.[7]

In a letter dated November 4, 2010, the Corps notified Plaintiffs that Idlewood Stage 2 "appears to be acceptable for use as a source" of borrow

---

[3] *See* 33 U.S.C. § 2283.

[4] The complaint is unclear as to when Plaintiffs discovered the borrow material.

[5] *See* R. Doc. 31-1.

[6] *Id.* at p. 15.

[7] *Id.*

material.[8] The letter confirmed the preliminary report's determination that excavation would harm the environment.[9] The letter required Plaintiffs to "provide proof of mitigation to the Corps[] . . . prior to excavation."[10] The Corps issued a similar letter on April 14, 2011, reaffirming the requirement that Plaintiffs provide mitigation.[11] The letter informed Plaintiffs that their "compensatory mitigation requirements may be met" by obtaining credits from select mitigation banks.[12]

Plaintiffs subsequently hired Mitigation Strategies, LLC ("Mitigation Strategies") hoping to convince the Corps of the "legal and factual errors underlying [its] mitigation requirements."[13] Mitigation Strategies argued to the Corps on numerous occasions that mitigation was neither necessary nor appropriate under the law. In the alternative, if mitigation was required, Mitigation Strategies argued the law required in-kind mitigation, rather than the purchase of credits from mitigation banks.

The Corps disagreed. On June 24, 2011, the Corps informed Plaintiffs that mitigation is "require[d] [to] be accomplished through the purchase of bank credits."[14] Mitigation Strategies

---

[8] R. Doc. 31-3 at p. 2.

[9] *Id.* at p. 3.

[10] *Id.*

[11] *See* R. Doc. 31-5.

[12] *Id.* at p. 2.

[13] R. Doc. 31 at ¶64.

[14] R. Doc. 31-6 at p. 2.

responded to this letter with further efforts to convince the Corps that mitigation was unnecessary. These efforts culminated in a February 20, 2013 letter from the District Commander.[15] The letter reiterated the Corps's previous position that borrow material from Idlewood Stage 2 could not be excavated for use in HSDRRS projects until credits were purchased from a mitigation bank (the "Mitigation Requirement").[16]

Plaintiffs filed suit against the Corps and various Corps employees on June 10, 2013. They contend that the Water Resource Development Act ("WRDA"), 33 U.S.C. § 2201 *et seq*., does not authorize mitigation for Idlewood Stage 2 or alternatively that the WRDA does not authorize the Corps to mandate the purchase of mitigation credits as the sole form of compensatory mitigation. Plaintiffs also assert claims under the Takings Clause and the Due Process Clause of the Fifth Amendment.

LEGAL STANDARD

I. Motion to Dismiss for Lack of Subject Matter Jurisdiction—Rule 12(b)(1)

A Rule 12(b)(1) motion challenges the subject matter jurisdiction of a federal district court. "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case."[17] In

---

[15] *See* R. Doc. 17-7.

[16] *See id.*

[17] *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998).

ruling on a Rule 12(b)(1) motion to dismiss, the court may rely on (1) the complaint alone, presuming the allegations to be true; (2) the complaint supplemented by undisputed facts; or (3) the complaint supplemented by undisputed facts and by the court's resolution of disputed facts.[18] The proponent of federal court jurisdiction bears the burden of establishing subject matter jurisdiction.[19]

II. Motion to Dismiss for Failure to State a Claim—Rule 12(b)(6)

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead enough facts "to state a claim to relief that is plausible on its face."[20] A claim is "plausible on its face" when the pleaded facts allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged."[21] In reviewing the legal sufficiency of a complaint, the Court is mindful that Rule 12(b)(6) motions are disfavored under the law and rarely granted.[22]

III. Motion for a More Definite Statement—Rule 12(e)

A district court will grant a motion for a more definite statement when the challenged pleading "is

---

[18] *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424 (5th Cir. 2001).

[19] *See Physicians Hosps. of Am. v. Sebelius*, 691 F.3d 649, 652 (5th Cir. 2012).

[20] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[21] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[22] *Lowery v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997).

so vague or ambiguous that the [moving] party cannot reasonably prepare a response."[23] When adjudicating such motions, the Court must assess the complaint in light of the minimal pleading requirements of Rule 8.[24] Rule 8(a)(2)requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[25] "Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[26] In light of the liberal pleading standard set forth in Rule 8, Rule 12(e) motions are disfavored.[27]

LAW AND ANALYSIS

Defendants move to dismiss this action on multiple grounds. Specifically, Defendants argue that (1) Plaintiffs lack Article III standing; (2) Plaintiffs have not challenged a "final agency action" under the Administrate Procedure Act ("APA"), 5 U.S.C. § 501 *et seq.*; (3) dismissal is warranted under the doctrine of "prudential standing;" and (4) Plaintiffs fail to state a claim for relief under the

---

[23] Fed. R. Civ. P. 12(e). The moving party "must point out the defects complained of and the details desired." *Id.*

[24] *Babcock & Wilcox Co. v. McGriff, Siebels & Williams, Inc.*, 235 F.R.D. 632, 633 (E.D. La. 2006).

[25] Fed. R. Civ. P. 8(a)(2).

[26] *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (internal quotation marks and citations omitted).

[27] *See Mitchell v. E–Z Way Towers, Inc.*, 269 F.2d 126, 132 (5th Cir.1959); *Who Dat Yat Chat, LLC v. Who Dat, Inc.*, Nos. 10–1333, 10–2296, 2012 WL 2087439, at *6 (E.D. La. June 8, 2012).

Takings Clause and Due Process Clause of the Fifth Amendment.

I. Whether Jurisdiction is Proper

Defendants' first two arguments—lack of Article III standing and final agency action under the APA—are threshold issues that affect this Court's subject matter jurisdiction.[28] The Court addresses the jurisdictional challenges first.[29]

A. *Article III Standing*

The doctrine of standing derives from Article III of the Constitution, which limits the jurisdiction of federal courts to "Cases" and "Controversies."[30] A case is not justiciable unless the plaintiff has standing to sue.[31] Article III standing has three elements: "(1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likel[ihood] that the

---

[28] *See United States v. Hays*, 515 U.S. 737, 742 (1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'") (alteration in original) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230–31 (1990)); *Peoples Nat'l Bank v. Office of Comptroller of Currency of U.S.*, 362 F.3d 333, 336 (5th Cir. 2004) ("If there is no 'final agency action,' a federal court lacks subject matter jurisdiction.").

[29] *See Sinochem Int'l Co. LTD v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) ("[J]urisdictional questions ordinarily must precede merits determinations in dispositional order.").

[30] U.S. Const. art. III, § 2.

[31] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998).

injury will be redressed by a favorable decision."[32] The party invoking the federal court's jurisdiction bears the burden of establishing these elements.[33] Nonetheless, the Supreme Court has cautioned that where, as here, standing is challenged on the pleadings, "general factual allegations of injury resulting from the defendant's conduct may suffice."[34] This follows from the presumption that general allegations in a complaint encompass the specific facts necessary to support those allegations.[35]

An injury sufficient to establish Article III standing must be "(a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical."[36] Plaintiffs' allegations of injury are multiple. Specifically, Plaintiffs allege (1) that an existing contract has been harmed,[37] (2) that the Mitigation Requirement is prohibitively expensive, and (3) that they are now subject to increased

---

[32] *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (alteration in original) (internal quotation marks omitted).

[33] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

[34] *Id.* at 560.

[35] *Steel Co.*, 523 U.S. at 104.

[36] *Lujan*, 504 U.S. at 560 (internal quotation marks and citation omitted).

[37] At some point after the Corps issued the preliminary report, Plaintiffs contracted with an independent mining company to excavate, process, and sell borrow material from Idlewood Stage 2. The contract provided that Plaintiffs would receive a royalty payment on each ton of borrow material sold.

business competition. At the pleadings stage, these allegations clearly suffice to establish injury-in-fact.[38]

In order to establish the requisite causal connection between injury and misconduct, the plaintiff need not show that the defendant's actions "are the very last step in the chain of causation,"[39] or that the defendant's actions are a proximate cause of his injury.[40] Rather, the plaintiff need only establish his injury is "fairly traceable" to the defendant's actions.[41]

Plaintiffs' injuries are fairly traceable to the Mitigation Requirement. Plaintiffs' contract with the mining company was directly affected by the Mitigation Requirement. Moreover, Plaintiffs allege it will cost approximately $1.64 million to purchase mitigation credits.[42] Obviously, Plaintiffs would not be subject to this financial burden but for the Mitigation Requirement. Plaintiffs further allege the

---

[38] *See Envtl. Defense Fund v. Marsh*, 651 F.2d 983, 1003 (5th Cir. 1981) ("Economic injury from business competition created as an indirect consequence of agency action can serve as the required 'injury in fact.'"); *Lujan*, 504 U.S. at 578 (finding that "a company's interest in marketing its product free from competition" is a "legally cognizable injur[y]" for purposes of Article III standing). It should be noted that just like the Plaintiffs in this matter, the plaintiffs in *Marsh* alleged a violation of the WRDA.

[39] *Bennet v. Spear*, 520 U.S. 154, 168–69 (1997).

[40] *Lexmark*, 134 S. Ct. at 1391 n.6.

[41] *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).

[42] R. Doc. 31 at ¶62.

Mitigation Requirement has made their business significantly less profitable, as it requires them to sell borrow material above market price in order to recoup the cost of purchasing mitigation credits.[43]

In response, Defendants narrowly focus on the allegations in the complaint relating to the business relationship between Plaintiffs and the mining company. They argue that Plaintiffs are only harmed by the Mitigation Requirement insofar as the mining company is harmed. According to Defendants, this causal chain is too attenuated to establish standing.

Defendants' argument unduly restricts and misreads the allegations in the complaint. Plaintiffs have clearly alleged the Corps requires the contractor *or* Plaintiffs to provide mitigation.[44] Thus, if Plaintiffs are required to purchase mitigation credits, the resulting economic injury is directly traceable to the Mitigation Requirement. Unlike Defendants' tortuous argument, the allegations establishing causation are straightforward: the Mitigation Requirement imposes a substantial cost on Plaintiffs that prohibits the profitable sale of borrow material from Idlewood Stage 2.

Having sufficiently pleaded an injury-in-fact fairly traceable to the Mitigation Requirement, Plaintiffs need only establish redressability, that is, "a likelihood that the requested relief will redress the alleged injury."[45] A plaintiff must demonstrate

---

[43] *See id.* at ¶82.

[44] *See, e.g.*, *id.* at ¶51.

[45] *Steel Co.*, 523 U.S. at 103.

redressability for each form of relief sought.[46] But where, as here, a plaintiff seeks both declaratory and injunctive relief, these two inquires essentially collapse into one.[47]

Plaintiffs seek a declaration that the Mitigation Requirement violates the WRDA, the Takings Clause, and the Due Process Clause. Plaintiffs also request the Court to enjoin the Corps from requiring any mitigation at all or alternatively from requiring the purchase of mitigation credits as the sole form of compensatory mitigation. The Court clearly has the power to provide the requested relief and finds that a judgment in favor of Plaintiffs would redress their injuries.[48] Plaintiffs have sufficiently pleaded the triad of injury-in-fact, causation, and redressability, and therefore have established standing to sue under Article III.

B. *Judicial Review Under the APA*

The Federal Government is immune from suit absent a waiver of sovereign immunity.[49] The APA provides such a waiver and allows judicial review of

---

[46] *St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Refining, L.L.C.*, 354 F. Supp. 2d 697, 705 (E.D. La. 2005).

[47] *See Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 906 (10th Cir. 2012) (finding that "if injunctive relief . . . meets the redressability requirement, . . . the same must be true of declaratory relief."

[48] *Cf. Steel Co.*, 523 U.S. at 108 (noting that when a plaintiff "ha[s] alleged a continuing violation or the imminence of a future violation . . . injunctive relief . . . would remedy that alleged harm.").

[49] *Loeffler v. Frank*, 486 U.S. 549, 554 (1988).

agency action when (1) the claimant does not seek money damages,[50] (2) no other statute precludes judicial review,[51] and (3) the challenged action is not committed to agency discretion by law.[52] Plaintiffs do not seek money damages. Moreover, nothing in the WRDA expressly or implicitly precludes judicial review, nor is the provision under which Plaintiffs have filed suit—33 U.S.C. § 2283—discretionary.[53]

Where, as here, the relevant statute does not provide for judicial review,[54] the APA authorizes judicial review of "final agency action for which there is no other adequate remedy" at law.[55] The question presented is whether the District Commander's February 20, 2013 letter constitutes "final agency action" for purposes of the APA. The parameters of this inquiry are well-defined. In order to be considered final, agency action must (1) "mark the consummation of the agency's decision-making process," and (2) "be one by which rights or obligations have been determined, or from which

---

[50] 5 U.S.C. § 702.

[51] 5 U.S.C. § 701(a)(1).

[52] 5 U.S.C. § 701(a)(2).

[53] The relevant portions of the statute use the imperative "shall." *See, e.g.*, 33 U.S.C. § 2283(a)(1)(A), (d). Given the language chosen, a finding of agency discretion "would fly in the face of [the] text." *Bennett*, 520 U.S. at 175.

[54] *See Marsh*, 651 F.3d at 1003 ("[T]he WRDA establishes no specific right to judicial review of an agency action.").

[55] *Belle Co. v. U.S. Army Corps of Eng'rs*, No. 13–30262, 2014 WL 3746464, at *2 (5th Cir. 2014); 5 U.S.C. § 704.

legal consequences will flow.[56] In undertaking this two-part inquiry, the Court is "guided by the Supreme Court's interpretation of the APA's finality requirement as 'flexible' and 'pragmatic.'"[57]

Agency action satisfies the first part of this inquiry when the agency "has asserted its final position on the factual circumstances underpinning its action," or when the action "has proceeded through an administrative appeal process and is not subject to further agency review."[58] Reviewing the allegations in the complaint in the light most favorable to Plaintiffs, the Court finds that the District Commander's letter marks the consummation of the Corp's decision- making process.[59] Defendants have not identified any allegations in the complaint nor provided any evidence to the contrary.

Instead, Defendants contend the District Commander's letter is not final because it does not affect Plaintiffs' legal rights or obligations. Defendants quote the following language from *National Pork Producers Council v. E.P.A.* in support of their position: "an agency's actions are not

---

[56] *Bennett*, 520 U.S. at 177–78.

[57] *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149–50 (1967)).

[58] *Belle Co.*, 2014 WL 3746464, at *4.

[59] *See Ciba-Geigy Corp. v. E.P.A.*, 801 F.2d 430, 437 (D.C. Cir. 1986) (finding guidance letter marked consummation of decision-making process where court had "no reason to believe that the [author] lack[ed] authority to speak for [the agency] . . . or that his statement of the agency's position could be appealed to a higher level of [the agency's] hierarchy.").

reviewable when they merely reiterate what has already been established."[60] Because the Mitigation Requirement has been in effect for years, Defendants argue the District Commander's letter could not have affected Plaintiffs' legal rights. The Court disagrees for multiple reasons.

First, *National Pork Producers* is inapposite. In that case, the court found guidance letters issued by the EPA that "merely restate [a statute's] prohibition . . . have no effect on a party's rights or obligations."[61] The letter issued in this case does not merely restate the requirements of the WRDA. Plaintiffs argue the letter provides an *inaccurate* restatement of the WRDA's mitigation requirement. Moreover, unlike the letters in *National Pork Producers*, the District Commander's letter clearly imposes an affirmative obligation, namely, to purchase mitigation credits prior to the excavation of borrow material from Idlewood Stage 2. This mandate clearly determines rights or obligations by imposing legal consequences on Corps officials administering the Mitigation Requirement and on landowners like Plaintiffs who must comply with the requirement.[62]

The final hurdle to judicial review is that Plaintiffs have no other adequate remedy at law.[63]

---

[60] 635 F.3d 738, 756 (5th Cir. 2011).

[61] *Id.*

[62] *See Nat'l Envtl. Dev. Ass'n's Clean Air Project v. E.P.A.*, 752 F.3d 999, 1007 (D.C. Cir. 2014).

[63] *See Sackett v. E.P.A.*, 132 S. Ct. 1367, 1372 (2012); 5 U.S.C. § 704.

Given that the WRDA does not provide a private right of action, the Court can conceive of no other way that Plaintiffs could obtain the relief requested other than by filing suit under the APA. Judicial review is proper.

II. Whether Plaintiffs State a Claim for Relief

Having determined that jurisdiction is proper, the Court may now proceed to a merits determination. Defendants move to dismiss all of Plaintiffs' claims for lack of prudential standing or alternatively to dismiss Plaintiffs' Fifth Amendment claims under Rule 12(b)(6). The Court addresses each argument separately.

A. *"Prudential Standing" or "Right to Sue"?*

The Supreme Court's standing jurisprudence has historically consisted of two strands: "Article III standing, which enforces the Constitution's case-or-controversy requirement . . . and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction."[64] As recently as 2012, the Supreme Court reaffirmed that a litigant must establish both Article III standing and prudential standing as a *sine qua non* to suit under the APA.[65]

The Supreme Court's recent decision in *Lexmark* appears to have severed the legs from the

---

[64] *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11–12 (2004) (internal quotation marks and citations omitted).

[65] *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012).

doctrine of prudential standing.[66] In a unanimous opinion issued earlier this year, the Court explained that the idea that a federal court "can[] limit a cause of action that Congress has created merely because 'prudence' dictates" is fundamentally inconsistent with a federal court's "virtually unflagging" obligation to exercise jurisdiction.[67] Thus, the proper inquiry is not whether a federal court should decline to exercise jurisdiction but instead whether a particular plaintiff "falls within the class of plaintiffs whom Congress has authorized to sue [under the relevant statute]."[68]

A plaintiff establishes the statutory "right to sue"[69] if (1) his interests "fall within the zone of interests protected" by the statute, and (2) his

---

[66] *See Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, Nat'l Ass'n*, Nos. 12–20367, 12–20375, 12–20376, 12–20377, 12–20378, 12–20381, 12–20382, 12–10784, 2014 WL 1633508, at *5 (5th Cir. 2014) (recognizing that "the continued vitality of prudential 'standing' is now uncertain in the wake of the Supreme Court's recent decision in Lexmark.").

[67] *Lexmark*, 134 S. Ct. at 1386–88.

[68] *Id.* at 1387. Unlike when a court considers Article III standing, "[t]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case." *Id.* at 1387 n.4 (emphasis in original). Accordingly, to the extent the doctrine of prudential standing remains viable, it should no longer be considered alongside Article III standing as a threshold jurisdictional requirement. Rather, prudential standing—in whatever form it still exists—is properly considered on a motion to dismiss for failure to state a claim upon which relief can be granted.

[69] After striking down the doctrine prudential standing, the Court applied its newly- articulated framework under the heading "Static Control's *Right To Sue* Under § 1125(a)." *See id.* at 1387 (emphasis added).

injuries are proximately caused by a violation of the statute.[70] When applied to suit under the APA, the zone-of-interests test "is not especially demanding."[71] "[T]he test forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'"[72]

Defendants argue that Plaintiffs impermissibly apply the zone of interests test to multiple provisions of the WRDA, namely, 33 U.S.C. §§ 2281 and 2283. Citing the Supreme Court's 1997 decision in *Bennett*, they argue the test should only be applied to the provision under which suit is brought—in this case, 33 U.S.C. § 2283. According to Defendants, Section 2283 does not protect Plaintiffs' interests. The Court disagrees with this line of argument for multiple reasons.

First, *Bennett* does not support the proposition for which it is cited. The plaintiffs in *Bennett* alleged that a biological opinion issued by the Fish and Wildlife Service violated, *inter alia*, Section 1536 of the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1531 *et seq*.[73] One of the issues presented

---

[70] *See id.* at 1388–91. The first element—often referred to as the "zone-of-interests" test—has historically formed part of the prudential standing doctrine. *See id.* at 1368. Despite the apparent repudiation of this doctrine, the zone-of-interests test remains relevant for determining a plaintiff's statutory right to sue. *See id.* at 1388–90.

[71] *Id.* at 1389.

[72] *Id.* at 1389 (quoting *Patchak*, 132 S. Ct. at 2210).

[73] 520 U.S. at 157–60.

was whether the plaintiffs had prudential standing to bring this claim under the APA.[74] The court of appeals held that the zone of interests test was not met, "since petitioners are neither directly regulated by the ESA nor seek to vindicate its *overarching purpose* of species preservation."[75] The Supreme Court reversed, holding that whether the zone of interests test is met "is to be determined not by reference to the overall purpose of the Act in question [here, species preservation], but by reference to the particular provision of law upon which the plaintiff relies."[76] Accordingly, the Court applied the zone of interest test to Section 1536.[77]

Fairly read, *Bennett* does not stand for the proposition that a court is *per se* precluded from considering the overall purpose of the statutory scheme in applying the zone of interests test. Rather, *Bennett* merely held that it was legal error for the court of appeals to focus *solely* on the ESA's purpose to the exclusion of the provision under which suit was brought. Nothing in the opinion categorically forbids the district court from considering the overarching purpose of an act in determining whether a provision of that act protects a particular plaintiff's interests.

Second, even assuming *Bennett* requires the zone of interest test *only* be applied to the statutory provision allegedly violated, the *Lexmark* Court

---

[74] *See id.* at 174–77.

[75] *Id.* at 175 (emphasis added).

[76] *Id.* at 175–76 (alteration in original).

[77] *See id.* at 176–77.

overruled *Bennett* on this point.[78] The plaintiffs in *Lexmark* brought suit under the Lanham Act, alleging false advertising under 15 U.S.C. § 1125(a).[79] As in *Bennett*, the Court addressed whether the plaintiff's interests were co-extensive with those protected by the relevant statute so as to establish prudential standing under the APA. Unlike *Bennett*, however, the *Lexmark* Court answered this question by "examining a detailed statement of the statute's purposes."[80] The Court found that statement in a separate provision of the Lanham Act—Section 1127.[81] The Court then compared the interests articulated in Section 1127 with those asserted by the plaintiff, ultimately concluding the latter fell within the aegis of the former.[82] In fact,

---

[78] Whether *Lexmark* overruled *Bennett* is a question of first impression in the federal courts.

[79] *See* 134 S. Ct. at 1384.

[80] *Id.* at 1389.

[81] *Id.* Section 1127 provides in relevant part as follows:

> "The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations."

[82] *See id.* at 1393.

the Court did not even mention Section 1125 in its zone-of-interests analysis.

Lexmark makes clear that—whatever the previous import of *Bennett*—a court may properly consider the overall purpose of a Congressional act when applying the zone of interests test, especially if that purpose is expressly articulated in a separate provision of the act. Like the Lanham Act, the WRDA contains a detailed statement of the statute's overarching purposes:

> Enhancing national economic development (including benefits to particular regions of the Nation not involving the transfer of economic activity to such regions from other regions), the quality of the total environment (including preservation and enhancement of the environment), the well-being of the people of the United States, the prevention of loss of life, and the preservation of cultural and historical values shall be addressed in the formulation and evaluation of water resources projects to be carried out by the Secretary, and the associated benefits and costs, both quantifiable and unquantifiable, and information regarding potential loss of human life that may be associated with flooding and coastal storm events, shall be displayed in the benefits and costs of such projects.[83]

---

[83] 33 U.S.C. § 2281(a).

The Plaintiffs' alleged economic injuries fall squarely within the auspices of the interests protected by the WRDA. This conclusion finds support in Fifth Circuit precedent. In *Marsh*, the Fifth Circuit interpreted a substantially similar statement of purpose in a federal water resources statute.[84] That statement required federal water projects to further the objectives of "enhancing regional economic development, the quality of the total environment . . . the well-being of the people of the United States, and the national economic development."[85] The Fifth Circuit found this language to be "explicit evidence that Congress intends federal projects to be governed in part by considerations of local economic development, such as the economic well-being of the [plaintiff]."[86]

Section 2281(a) of the WRDA contains a virtually identical statement of purpose.[87] Accordingly, it follows that one objective of the WRDA is to promote local economic development, which includes the economic well-being of those affected by WRDA regulations. Plaintiffs allege that a regulation promulgated under the WRDA—the Mitigation Requirement—has caused them economic injury. Under the liberal zone-of-interest test applicable to the APA, the Court has no problem concluding that the interests asserted in the

---

[84] *See* 651 F.3d at 1004–05.

[85] *Id.* at 1004 (alteration in original) (quoting 42 U.S.C. § 1962-2).

[86] *Id.* at 1004.

[87] *See supra* note 83.

complaint are sufficiently consistent with the interests the WRDA is designed to protect.

Plaintiffs have passed the zone-of-interest test, and the Court must now determine whether the allegations in the complaint establish proximate causation.[88] The question presented "is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits."[89] Put differently, a court inquires whether the plaintiff's injuries are "too remote from the defendant's unlawful conduct."[90]

Applying these precepts to the case at bar, the Court finds that Plaintiffs have adequately pleaded a causal connection between their injuries and Defendants' alleged misconduct. The economic injury alleged by Plaintiffs would not have occurred but for the Mitigation Requirement. Accordingly, Plaintiffs have the right to sue under Section 2283 of the WRDA.

B. *The Takings Clause*

The Takings Clause of the Fifth Amendment prohibits the government from taking private property for public use without just compensation.[91]

---

[88] *See Lexmark*, 134 S. Ct. at 1393.

[89] *Id.* at 1390.

[90] *Id.* (internal quotation marks omitted).

[91] U.S. Const. amend. V, cl.4. The purpose of the Takings Clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The Supreme Court recognizes two distinct classes of takings that require compensation.[92] The first involves the "direct appropriation" of private property or the "practical ouster of [the owner's] possession."[93] The other type of taking—a so-called "regulatory taking"—occurs when government regulation of private property is "so onerous that its effect is tantamount to a direct appropriation or ouster."[94] Plaintiffs allege the Corps's actions constitute a regulatory taking.

The Supreme Court has generally eschewed any set formula for determining whether a regulatory action constitutes a taking.[95] Nonetheless, certain bright-line rules have emerged. For example, when the owner is required to endure a "permanent physical invasion" of his property, the government must provide just compensation.[96] Another type of *per se* taking occurs when a regulation "denies all economically beneficial or productive use of land."[97]

---

[92] *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522–23 (1992).

[93] *Lucas v. S.C. Coastal Coalition*, 505 U.S. 1003, 1014 (1992).

[94] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

[95] *Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002); *Lucas*, 505 U.S. at 1015.

[96] *Lingle*, 544 U.S. at 538.

[97] *Lucas*, 505 U.S. at 1015.

Neither of these situations is presented by the case at bar. Plaintiffs do not allege a direct appropriation of their land. Moreover, the allegations in the complaint do not indicate that Plaintiffs have been completely deprived of any beneficial uses so as to leave their property "economically idle."[98] Rather, Plaintiffs allege the Mitigation Requirement made Idlewood Stage 2 "less valuable,"[99] thereby implying the land still retains *some* value. The Supreme Court has clarified that the "total takings rule" only applies in the "extraordinary circumstance" where government regulation "wholly eliminate[s] the value" of private property.[100]

Subject to one exception inapplicable here,[101] the constitutionality of a regulatory taking is measured against the "justice and fairness" of the governmental action.[102] To elucidate these abstract concepts, the Supreme Court has enumerated multiple factors a court may consider, including "the

---

[98] *Id.* at 1019.

[99] *See* R. Doc. 31 at ¶83; *see also id.* at ¶118 (alleging the Mitigation Requirement "substantially decreases the value of the Idlewild Stage 2 tract"); *id.* at ¶134 ("[T]he economic impact of the [Mitigation Requirement] . . . is . . . in the form of . . . dramatic depreciation of property value.").

[100] *See Tahoe–Sierra*, 535 U.S. at 1483.

[101] In *Lingle*, the Supreme Court held that land-use exactions are not subject to the multi-factor balancing test described *infra* but are instead analyzed according to the Court's decisions in *Nollan v. California Coastal Communication,* 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *See Lingle*, 544 U.S. at 546–48.

[102] *See E. Enters. v. Apfel*, 524 U.S. 498, 523 (1998).

regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action."[103] This inquiry is necessarily fact-intensive,[104] and is therefore "seldom" appropriate for resolution on the pleadings.[105] The Court finds no reason to deviate from this general rule and will therefore deny the motion to dismiss.

C. *Due Process*

The Fifth Amendment forbids the deprivation of "life, liberty, or property, without due process of law."[106] Due process offers both substantive

---

[103] *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978)).

[104] *See Tahoe–Sierra*, 535 U.S. at 322 ("Our regulatory takings jurisprudence . . . is characterized by essentially ad hoc, factual inquiries, . . . designed to allow careful examination and weighing of all the relevant circumstances.") (internal quotation marks and citations omitted); *Yee*, 503 U.S. at 523 (noting that a regulatory takings analysis "necessarily entails complex factual assessments of the purposes and economic effects of government actions.").

[105] *McDougal v. Cnty. of Imperial*, 942 F.2d 668, 676 (9th Cir. 1991). As the Ninth Circuit explained in an earlier opinion: "Th[e] admonition [against Rule 12(b)(6) dismissal] is perhaps nowhere so apt as in cases involving claims of inverse condemnation where the Supreme Court itself has admitted its inability to develop any set formula for determining when compensation should be paid, . . . resorting instead to essentially ad hoc, factual inquiries to resolve this difficult question." *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986) (internal quotation marks and citation omitted).

[106] U.S. Const. amend. V, cl. 3.

and procedural protections.[107] The procedural component ensures that an individual is given notice and an opportunity to be heard before he or she is a deprived of a property interest,[108] whereas the substantive component "bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them."[109]

Defendants move to dismiss Plaintiffs' claim for violation of their rights to procedural due process. The complaint, however, does not assert a procedural due process claim. Rather, it alleges the Corps's decision to impose the Mitigation Requirement was arbitrary and capricious.[110] Accordingly, Plaintiffs clearly invoke the substantive protections of the Due Process Clause.[111] Because Plaintiffs have not asserted a procedural due process claim, the motion to dismiss same is denied.

---

[107] *See Frazier v. Garrison I.S.D.*, 980 F.2d 1514, 1528 (5th Cir. 1993).

[108] *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

[109] *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (internal quotation marks omitted).

[110] *See* R. Doc. 31 at ¶¶138–44. Plaintiffs' opposition memorandum also makes clear that their claim is one for substantive due process; not procedural due process. *See* R. Doc. 37 at p. 24–25.

[111] In "rare cases," a substantive due process claim may be premised on a deprivation of property. *See Simi Inv. Co. v. Harris Cnty., Tex.*, 256 F.3d 323, 323–24 (5th Cir. 2001) (per curiam). The Court need not address whether this case presents one of those rare circumstances.

III. Whether the Court Should Compel a More Definite Statement

Defendants argue the complaint is impermissibly vague for failure to "put forward a specific legal theory supported by citations."[112] This argument is deficient from root to stem. The law is clear that a complaint need not identify with precision the legal basis for the relief requested.[113] Rather, a complaint satisfies the liberal pleading requirements of Rule 8 if it alleges facts sufficient to provide notice of a claim.[114] The complaint does just that. Moreover, by filing a motion to dismiss discrete claims, Defendants refute their own argument that the complaint is too vague to answer.[115] The motion for a more definite statement is denied.

CONCLUSION

Plaintiffs have established standing and therefore the justiciability of this case under Article

---

[112] R. Doc. 32-1 at p. 24.

[113] *See McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 551 (5th Cir. 2003) ("The plaintiff need not correctly specify the legal theory, so long as the plaintiff alleges facts upon which relief can be granted."); *Dileo v. Lakeside Hosp.*, No. 09–2838, 2010 WL 1936221, at *3 (E.D. La. May 12, 2010) ("Although plaintiffs do not specifically identify the legal basis for their claims, such specificity is not required under the federal rules.").

[114] *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

[115] *See Murungi v. Tex. Guaranteed*, 646 F. Supp. 2d 804, 811 (E.D. La. 2009) (denying motion for more definite statement where defendant had previously filed answers and motions to dismiss).

III. Furthermore, the Court finds that judicial review is proper under the APA, that Plaintiffs state a claim for relief under the Fifth Amendment, and that the complaint satisfies the notice pleading requirement of Rule 8. Accordingly, the instant Motion is denied in its entirety.

New Orleans, Louisiana, this 2nd day of September, 2014.

/s/
JANE TRICHE MILAZZO
UNITED STATES DISTRICT JUDGE

[ENTERED: January 28, 2016]

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

WHITE OAK REALTY, LLC	**CIVIL ACTION**
VERSUS	**NO: 13–4761**
UNITED STATES ARMY CORP OF ENGINEERS, ET AL.	**SECTION "H"(3)**

ORDER AND REASONS

Before the Court is Defendants' Motion for Judgment on the Pleadings (Doc. 84). For the following reasons, the Motion is GRANTED IN PART. Plaintiffs' Substantive Due Process claims are DISMISSED.

BACKGROUND

This is a civil action for declaratory and injunctive relief. The plaintiffs are White Oak Realty, LLC and Citrus Realty, LLC. The defendants are the United States Corps of Engineers (the "Corps") and various Corps employees. The dispute involves mitigation requirements imposed by the Corps on a tract of land in Southeast Louisiana ("Idlewood Stage 2") jointly owned by Plaintiffs.

In response to the devastation caused by Hurricanes Katrina and Rita, Congress authorized the Corps to undertake a series of projects collectively known as the Hurricane and Storm Damage Risk Reduction System ("HSDRRS"). One of these projects involves the use of soil and clay ("borrow material") to reinforce levees and floodwalls

in the Gulf South. Under the applicable statutes and regulations, the Corps determines whether a particular location is a suitable source of borrow material and if so whether mitigation of losses to fish and wildlife is necessary.[1]

At some point in 2010, Plaintiffs discovered the presence of borrow material in Idlewood Stage 2.[2] They subsequently filed a "suitability determination" with the Corps to confirm the borrow material could be used in HSDRRS projects. In October 2010, the Corps issued a preliminary report approving the use of borrow material from Idlewood Stage 2 and nine other sites.[3] The report found that the excavation of borrow material from Idlewood Stage 2 would cause "unavoidable impacts" to the environment.[4] Accordingly, if Idlewood Stage 2 were ultimately approved for HSDRRS projects, the landowner or contractor would be required to provide compensatory mitigation prior to excavation by purchasing credits from a mitigation bank.[5]

In a letter dated November 4, 2010, the Corps notified Plaintiffs that Idlewood Stage 2 "appears to be acceptable for use as a source" of borrow material.[6] The letter confirmed the preliminary report's determination that excavation would harm

---

[1] *See* 33 U.S.C. § 2283.

[2] The complaint is unclear as to when Plaintiffs discovered the borrow material.

[3] *See* Doc. 31-1.

[4] *Id.* at p. 15.

[5] *Id.*

[6] Doc. 31-3 at p. 2.

the environment.[7] The letter required Plaintiffs to "provide proof of mitigation to the Corps[] . . . prior to excavation."[8] The Corps issued a similar letter on April 14, 2011, reaffirming the requirement that Plaintiffs provide mitigation.[9] The letter informed Plaintiffs that their "compensatory mitigation requirements may be met" by obtaining credits from select mitigation banks.[10]

Plaintiffs subsequently hired Mitigation Strategies, LLC ("Mitigation Strategies") hoping to convince the Corps of the "legal and factual errors underlying [its] mitigation requirements."[11] Mitigation Strategies argued to the Corps on numerous occasions that mitigation was neither necessary nor appropriate under the law. In the alternative, if mitigation was required, Mitigation Strategies argued the law required in-kind mitigation, rather than the purchase of credits from mitigation banks.

The Corps disagreed. On June 24, 2011, the Corps informed Plaintiffs that mitigation is "require[d] [to] be accomplished through the purchase of bank credits."[12] Mitigation Strategies responded to this letter with further efforts to convince the Corps that mitigation was unnecessary.

---

[7] *Id.* at p. 3.

[8] *Id.*

[9] *See* Doc. 31-5.

[10] *Id.* at p. 2.

[11] Doc. 31 at ¶64.

[12] Doc. 31-6 at p. 2.

These efforts culminated in a February 20, 2013 letter from the District Commander.[13] The letter reiterated the Corps's previous position that borrow material from Idlewood Stage 2 could not be excavated for use in HSDRRS projects until credits were purchased from a mitigation bank (the "Mitigation Requirement").[14]

Plaintiffs filed this suit against the Corps and various Corps employees on June 10, 2013. They contend that the Water Resource Development Act ("WRDA"), 33 U.S.C. § 2201 *et seq.*, does not authorize mitigation for Idlewood Stage 2 or alternatively that the WRDA does not authorize the Corps to mandate the purchase of mitigation credits as the sole form of compensatory mitigation. Plaintiffs also assert claims under the Takings Clause and the Due Process Clause of the Fifth Amendment.

In this Motion, Defendants move for a partial judgment on the pleadings, arguing that this Court lacks jurisdiction over Plaintiffs' Fifth Amendment takings and substantive due process claims. This Court will address each of Defendants' arguments in turn.

LEGAL STANDARD

Rule 12(c) provides that a party may move for judgment on the pleadings after pleadings are closed but early enough not to delay trial.[15] The standard

---

[13] *See* Doc. 17-7.

[14] *See id.*

[15] Fed. R. Civ. P. 12(c) (2014).

for determining a Rule 12(c) motion based on a lack of subject matter jurisdiction is the same as a Rule 12(b)(1) motion to dismiss.[16]

A Rule 12(b)(1) motion challenges the subject matter jurisdiction of a federal district court. "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case."[17] In ruling on a Rule 12(b)(1) motion to dismiss, the court may rely on (1) the complaint alone, presuming the allegations to be true, (2) the complaint supplemented by undisputed facts, or (3) the complaint supplemented by undisputed facts and by the court's resolution of disputed facts.[18] The proponent of federal court jurisdiction—in this case, the Plaintiff—bears the burden of establishing subject matter jurisdiction.[18]

LAW AND ANALYSIS

Defendants assert three grounds on which they allege that this Court lacks jurisdiction to hear Plaintiffs' takings and substantive due process claims. First, Defendants allege that Plaintiffs' takings claims are barred because the United States has not waived its sovereign immunity from claims seeking declaratory and injunctive relief from a

---

[16] 5C ALAN WRIGHT & ARTHUR MILLER, FED. PRAC. & PROC. CIV. § 1367 (3d ed.).

[17] *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998).

[18] *Den Norske Stats Oljesels kap As v. Heere MacVof*, 241 F.3d 420, 424 (5th Cir. 2001).

[18] *See Physicians Hosps. of Am. v. Sebelius*, 691 F.3d 649, 652 (5th Cir. 2012).

takings claim if just compensation is available. Second, Defendants allege that federal courts do not have jurisdiction to grant declaratory or injunctive relief under the Takings Clause. Third, Defendants argue that "Plaintiffs' substantive due process claim is jurisdictionally barred because it is subsumed by the takings claim and is therefore premature." This Court will address each argument in turn.

At the outset, the Court notes that it declines Plaintiffs' request to defer ruling on this matter. "Federal courts are courts of limited jurisdiction" and as such, must consider jurisdictional attacks before any attack on the merits.[19] Accordingly, this Court will address whether it has jurisdiction to hear Plaintiffs' takings and due process claims.

A. The Takings Claim

The Takings Clause of the Fifth Amendment prohibits the government from taking private property for public use without just compensation.[20] Plaintiffs allege the Corps's actions constitute a regulatory taking. A "regulatory taking" occurs when government regulation of private property is "so onerous that its effect is tantamount to a direct appropriation or ouster."[21] Plaintiffs seek a

---

[19] *In re FEMA Trailer Formaldehyde Products Liab. Litig. (Mississippi Plaintiffs)*, 668 F.3d 281, 286 (5th Cir. 2012).

[20] U.S. Const. amend. V, cl.4. The purpose of the Takings Clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

[21] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

declaratory judgment that "the Corps's actions violate the Takings Clause of the Constitution's Fifth Amendment" and an injunction allowing Plaintiffs to forgo the Corps's Mitigation Requirement.[22] Plaintiffs' Second Amended Complaint expressly states that they "do not claim monetary damages as just compensation for a taking" because they have not yet complied with the Corps's requirement to purchase mitigation credits.

Defendants argue that the only available remedy for a Fifth Amendment takings claim is "just compensation" and that the United States has not waived its sovereign immunity from claims seeking declaratory or injunctive relief from a taking. They also argue that, under the Tucker and Little Tucker Acts, federal courts do not have jurisdiction to grant declaratory or injunctive relief under the Takings Clause.

The Tucker Act grants the United States Court of Federal Claims jurisdiction over claims for money damages "against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."[23] Likewise, the Little Tucker Act states that:

> the district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of . . .

---

[22] Doc. 31, p. 30.

[23] 28 U.S.C. § 1491.

> any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . . .[24]

Neither of these statutes create substantive rights, "but are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law."[25]

The Supreme Court has made it clear that both the Tucker and Little Tucker Acts provide the United States' "consent to suit for certain money-damages claims."[26] Indeed, "[t]he Court of Claims was established, and the Tucker Act enacted, to open a judicial avenue for certain monetary claims against the United States."[27] The Acts have "long been construed as authorizing only actions for money judgments and not suits for equitable relief against the United States."[28] Plaintiffs do not seek money damages on their takings claim. Instead, they seek both a declaration that the Corps has violated the

---

[24] 28 U.S.C. § 1346.

[25] *United States v. Bormes*, 133 S. Ct. 12, 16–17 (2012) (internal quotations omitted).

[26] *Id.* at 16.

[27] *Id.* at 17.

[28] *Richardson v. Morris*, 409 U.S. 464, 465–66 (1973).

Takings Clause by imposing an unconstitutional condition and an injunction permitting Plaintiffs to furnish borrow material to HSDRRS projects without such conditions. Plaintiffs' claims neither directly nor indirectly seek payment from the United States, and as such, their claims fall outside of the Tucker Act's grant of jurisdiction.

A few cases, however, support the argument that a district court may have jurisdiction to consider a request for equitable relief on a Takings Claim if a claim for just compensation would not be available.[29] Plaintiffs argue that such is the case here. Plaintiffs rely on the Supreme Court's decision in *Eastern Enterprises v. Apfel* in making their argument that a takings claim for just compensation is unavailable to them and therefore equitable relief is the appropriate remedy.

In *Eastern Enterprises*, the plaintiff argued that the payments required by the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act") constituted an unconstitutional taking.[30] The Coal Act required plaintiff to make payments to a privately-operated fund for the benefit of retired miners who had previously worked for the company when it was involved in the coal industry.[31] The

---

[29] *See E. Enterprises v. Apfel*, 524 U.S. 498 (1998); *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 270 F.3d 180 (5th Cir. 2001) (holding prospective relief was appropriate when an action for just compensation was not available) *cert. granted, judgment vacated sub nom. Phillips v. Washington Legal Found.*, 538 U.S. 942 (2003) (holding no taking occurred).

[30] *Id.*

[31] *Id.*

plaintiff did not seek just compensation, but rather, requested a declaratory judgment that the Coal Act violated the Constitution and a corresponding injunction against its enforcement.[32] A plurality of the Supreme Court held that because the Coal Act mandated payments to be made to a privately-operated fund, monetary relief against the government was not a remedy that was available to plaintiff, and therefore equitable relief was an appropriate remedy.[33] The Supreme Court reaffirmed its prior statement that "the Declaratory Judgment Act 'allows individuals threatened with a taking to see a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained.'"[34]

Plaintiffs argue that this case is analogous to *Eastern Enterprises* because the Corps's Mitigation Requirement mandates that they pay funds to a third- party mitigation bank. Defendants rebut this statement by arguing that it is the *levee contractor*, not Plaintiffs, who must purchase mitigation credits prior to excavating the borrow material from Plaintiffs' property. The Environmental Report prepared by the Corps states that "[c]ompensatory mitigation is required to be completed prior to [environmental] impacts. The *landowners or contractors* will accomplish compensatory mitigation through the purchase of mitigation bank credits at an appropriate mitigation bank . . . ."[35] In the

---

[32] *Id.*

[33] *Id.* at 521.

[34] *Id.*

[35] Doc. 31-1.

Suitability Determination, the Corps further states that it will "require verification *from landowners* that mitigation obligations have been met prior to excavation."[36]

Regardless, this Court fails to see how such a distinction disrupts Plaintiffs' argument. Whether Plaintiffs or a third-party contractor pay funds to a third-party mitigation bank to purchase mitigation credits, an action for just compensation against the government would not be available to Plaintiffs. Because Plaintiffs are required to pay those amounts to a party other than the government, they would be unable to seek repayment from the government if the Mitigation Requirement was a taking. Like in *Eastern Enterprises*, the lack of a compensatory remedy renders equitable relief the appropriate remedy in this case.

Defendants attempt to make the distinction that the payments at issue in *Eastern Enterprises* were statutorily mandated by the Coal Act, whereas here mitigation credits need only be purchased if Plaintiffs seek to have their borrow material used in an HSDRRS project. They argue that equitable relief is available only where Congress has affirmatively withdrawn the right to pursue an action for just compensation by statute. In making this argument, Defendants rely on *Preseault v. I.C.C.* In *Preseault*, the Supreme Court held that equitable relief was not available for claims arising out of the Amendments to the National Trails System Act because the Amendments did not exhibit an unambiguous intention to withdraw a Tucker Act

---

[36] Doc 31-2.

remedy.[37] This Court finds that the facts of *Preseault* are readily distinguishable from those presented here.

In *Preseault*, the plaintiffs challenged the Amendments to the Trails Act, which authorized the preservation of railroad tracks not currently in service and authorized the interim use of that land as recreational trails.[38] The Amendments specified that those tracks-turned-trails were not to be treated as abandoned.[39] The plaintiffs argued that this provision ran afoul of state laws that provide that property subject to a right-of-way easement, such as those used by many railroads, reverts back to the landowner upon abandonment.[40] The plaintiffs argued that the provision of the Amendments that prevented these rights-of-way from being abandoned constituted a taking.[41] The plaintiffs therefore sought a ruling that this portion of the Trails Act was a taking without just compensation.[42] The Supreme Court held that such an action was premature because the plaintiffs had not yet sought just compensation under the Tucker Act.[43]

In *Preseault*, there was no mechanism—established by statute or otherwise—that prevented

---

[37] *Preseault v. I.C.C.*, 494 U.S. 1 (1990).

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 17.

the plaintiffs from seeking just compensation for the alleged taking from the government. By contrast, the plaintiffs in *Eastern Enterprises* and here are prevented from seeking just compensation from the government because the payments of which they complain are required to be paid to third parties. This is a wholly different situation than that set forth in *Preseault*. A Tucker Act remedy is not available to Plaintiffs and, therefore, whether Congress has withdrawn it is of no moment. Accordingly, this Court relies on the Supreme Court's ruling in *Eastern Enterprises* "that it is within the district courts' power to award such equitable relief" in holding that it has jurisdiction over Plaintiffs' claims for injunctive and declaratory relief.

To the extent that this holding still raises questions as to the waiver of sovereign immunity, this Court additionally holds that the APA waives sovereign immunity for Plaintiffs' equitable claims under the Takings Clause. The APA states that:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground

> that it is against the United States or that the United States is an indispensable party.[44]

Here, Plaintiffs seek declaratory and injunctive relief on the ground that the Corps's Mitigation Requirement constitutes an uncompensated taking. Plaintiffs claim that the Corps's actions have violated their right not to have property taken without just compensation.[45] By its plain language, the APA waives sovereign immunity for this claim. Plaintiffs allege the Corps—a government agency—has violated a legal right—the right not to have property taken without just compensation—and have requested equitable relief to remedy such.[46]

5 U.S.C. § 704 states, however, that the APA's waiver of sovereign immunity applies only when

---

[44] 5 U.S.C. § 702.

[45] The phrase 'legal wrong' under the Act means the invasion of a legally protected right. *Braude v. Wirtz*, 350 F.2d 702 (9th Cir.1965).

[46] THOMAS W. MERRILL, ANTICIPATORY REMEDIES FOR TAKINGS, 128 HARV. L. REV. 1630, 1643–44 (2015) ("The problems, as always, arise in regulatory takings cases. With respect to the federal government, the APA contains a general waiver of sovereign immunity for actions seeking relief other than 'money damages.' Thus, insofar as one can seek declaratory or equitable relife [sic] for takings (the issue of this Essay), the APA clears the way for suits in federal courts of general jurisdiction. The Tucker Act, which authorizes suits against the United States founded 'upon the Constitution,' has been held to constitute a waiver of sovereign immunity for claims seeking compensation for takings. Because there is no other waiver of federal sovereign immunity for claims for compensation, sovereign immunity stands as a barrier to such claims outside the jurisdictional limits prescribed by the Tucker Act.").

there is "no other adequate remedy." "In effect, § 704 withdraws the limited waiver of immunity under [5 U.S.C.] § 702 if an adequate judicial remedy is already available elsewhere."[47] The question then becomes whether there is some other avenue through which Plaintiffs could seek an adequate remedy. This Court has already established that no compensatory remedy is available to Plaintiffs. Accordingly, § 704 does not prevent the APA's waiver of sovereign immunity from applying in this case.

Defendants next challenge Plaintiffs' Takings Claim on the merits. They argue that Plaintiffs are not entitled to injunctive relief because they are not able to show a substantial threat of irreparable harm in light of the availability of an action for just compensation under the Takings Clause. This Court dismisses this argument for the same reason it dismissed those made above. The provision under the Mitigation Requirement mandating that Plaintiffs (or their contractors) buy mitigation credits from third-party mitigation banks renders a claim for just compensation against the government unavailable. Accordingly, Plaintiffs are not forestalled from showing irreparable harm in seeking injunctive relief. Plaintiffs' takings claims, therefore, survive.

B. Substantive Due Process

Defendants next argue that Plaintiffs' substantive due process claim is "jurisdictionally barred as premature and is subsumed by their

---

[47] *Consol. Edison Co. of New York v. U.S., Dep't of Energy*, 247 F.3d 1378, 1383 (Fed. Cir. 2001).

Takings Claim." The substantive due process clause "bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them."[48] The Supreme Court has held that substantive due process should not apply where another specific constitutional provision provides protection against the challenged governmental action.[49] The Fifth Circuit, however, has rejected a blanket rule that the Takings Clause will always subsume a substantive due process claim relating to the deprivation of property.[50] Instead, the Fifth Circuit has held that "a careful analysis must be undertaken to assess the extent to which a plaintiff's substantive due process claim rests on protections that are also afforded by the Takings Clause."[51] "Except in the rare cases of deprivations of property based on, for example, illegitimate and arbitrary governmental abuse, vague statutes, or retroactive statutes, the takings analysis established by the Supreme Court and [the Fifth] circuit should control constitutional violations involving property rights that have been infringed by governmental action."[52]

Plaintiffs' due process claim alleges the following:

---

[48] *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (internal quotation marks omitted).

[49] *Graham v. Connor*, 490 U.S. 386, 395 (U.S. 1989); *John Corp. v. City of Houston*, 214 F.3d 573 (5th Cir. 2000).

[50] *John Corp.*, 214 F.3d at 583.

[51] *Id.*

[52] *Simi Inv. Co. v. Harris Cty., Tex.*, 256 F.3d 323 (5th Cir. 2001).

> 140. Application of a Mitigation Requirement to the impact on upland BLHs [Bottomland Hardwood Forest] of borrow mining, but not to any other upland borrow mining impacts, is an arbitrary deprivation of a property interest in violation of the Due Process Clause.
>
> 141. Characterization of the Idlewild Stage 2 tract as "bottomland hardwood forest" within the meaning of the WRDA arbitrarily expands jurisdiction in excess of statutory authority and deprives Plaintiff of a property interest in violation of the Due Process Clause.
>
> 142. Imposition of the Credit Purchase Requirement when only costly wetlands credits are available, rather than allowing statutorily prescribed in-kind mitigation, is an arbitrary deprivation of a property interest in violation of the Due Process Clause.[53]

Plaintiffs seek "declaratory and injunctive relief from the Corps's arbitrary and irrational imposition of restraints that would deprive Plaintiffs of a property interest."[54] Plaintiffs allege that this claim is not a takings claim because it does not presuppose lawful government action but instead complains of arbitrary and irrational governmental action. Defendants rebut that these allegations are the same

---

[53] Doc. 31, p. 31.

[54] Doc 85, p. 14.

facts that support Plaintiffs' takings claim—the parties' disagreement over the Corps's interpretation of the mitigation required under the WRDA as it applies to Idlewild Stage 2. This Court agrees. These facts are not in line with those cases in which the Fifth Circuit has allowed a substantive due process claim to subsist independently of a takings claim.[55] Plaintiffs do not allege that a statute is unconstitutionally vague or that the government has abused its power in some way. Plaintiffs' substantive due process claims amount to a disagreement over the Corps's decisions regarding mitigation. Their takings claim is sufficient to address these concerns. Accordingly, Plaintiffs' substantive due process claims are dismissed with prejudice.

CONCLUSION

For the foregoing reasons, Defendants' Motion is GRANTED IN PART, and Plaintiffs' substantive due process claims are DISMISSED WITH PREJUDICE.

New Orleans, Louisiana, this 28th day of January, 2016.

/s/
JANE TRICHE MILAZZO
UNITED STATES DISTRICT JUDGE

---

[55] *See John Corp.*, 214 F.3d at 583 (holding that although Takings Clause claim was not ripe, plaintiffs could pursue substantive due process claim based on allegations that demolition of buildings was carried out under unconstitutionally vague laws)*; Simi Inv. Co.*, 256 F.3d 323 (5th Cir. 2001) (holding that plaintiff had alleged illegitimate governmental conduct sufficient to support a substantive due process claim when he alleged that the defendant had created a "nonexistent park" to benefit private interests).

[ENTERED: September 11, 2018]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30438

WHITE OAK REALTY, L.L.C.; CITRUS REALTY, L.L.C.,

Plaintiffs - Appellants

v.

UNITED STATES ARMY CORPS OF ENGINEERS; THOMAS P. BOSTICK, Lieutenant General, United States Army Chief of Engineers, in his official capacity; JOHN W. PEABODY, Major General, Commander, Mississippi Valley Division, United States Army Corps of Engineers, in his official capacity; RICHARD L. HANSEN, Colonel, Commander, New Orleans District, United States Army Corps of Engineers, in his official capacity,

Defendants - Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

Before WIENER, GRAVES, and HO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

[ENTERED: September 19, 2018]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30438

D.C. Docket No. 2:13-CV-4761

WHITE OAK REALTY, L.L.C.; CITRUS REALTY, L.L.C.,

Plaintiffs – Appellants

v.

UNITED STATES ARMY CORPS OF ENGINEERS; THOMAS P. BOSTICK, Lieutenant General, United States Army Chief of Engineers, in his official capacity; JOHN W. PEABODY, Major General, Commander, Mississippi Valley Division, United States Army Corps of Engineers, in his official capacity; RICHARD L. HANSEN, Colonel, Commander, New Orleans District, United States Army Corps of Engineers, in his official capacity,

Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

Before WIENER, GRAVES, and HO, Circuit Judges.[1]

---

[1] Judge Ho concurs in the judgment only.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

Certified as a true copy and issued as the mandate on Sep 19, 2018

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

33 U.S.C.A. § 2213

§ 2213. Flood control and other purposes

Effective: November 8, 2007
Currentness

(a) Flood control

(1) General rule

The non-Federal interests for a project with costs assigned to flood control (other than a nonstructural project) shall--

(A) pay 5 percent of the cost of the project assigned to flood control during construction of the project;

(B) provide all lands, easements, rights-of-way, and dredged material disposal areas required only for flood control and perform all related necessary relocations; and

(C) provide that portion of the joint costs of lands, easements, rights-of-way, dredged material disposal areas, and relocations which is assigned to flood control.

(2) 35 percent minimum contribution

If the value of the contributions required under paragraph (1) of this subsection is less than 35 percent of the cost of the project assigned to flood control, the non-Federal interest shall pay during construction of the project such additional amounts as are necessary so that the total contribution of the non-Federal interests under

this subsection is equal to 35 percent of the cost of the project assigned to flood control.

(3) 50 percent maximum

The non-Federal share under paragraph (1) shall not exceed 50 percent of the cost of the project assigned to flood control. The preceding sentence does not modify the requirement of paragraph (1)(A) of this subsection.

(4) Deferred payment of amount exceeding 30 percent

If the total amount of the contribution required under paragraph (1) of this subsection exceeds 30 percent of the cost of the project assigned to flood control, the non-Federal interests may pay the amount of the excess to the Secretary over a 15-year period (or such shorter period as may be agreed to by the Secretary and the non-Federal interests) beginning on the date construction of the project or separable element is completed, at an interest rate determined pursuant to section 2216 of this title. The preceding sentence does not modify the requirement of paragraph (1)(A) of this subsection.

(b) Nonstructural flood control projects

(1) In general

The non-Federal share of the cost of nonstructural flood control measures shall be 35 percent of the cost of such measures. The non-Federal interests for any such measures shall be required to provide all lands, easements, rights-of-way, dredged material disposal areas, and

relocations necessary for the project, but shall not be required to contribute any amount in cash during construction of the project.

(2) Non-Federal contribution in excess of 35 percent

At any time during construction of a project, if the Secretary determines that the costs of land, easements, rights-of-way, dredged material disposal areas, and relocations for the project, in combination with other costs contributed by the non-Federal interests, will exceed 35 percent, any additional costs for the project (not to exceed 65 percent of the total costs of the project) shall be a Federal responsibility and shall be contributed during construction as part of the Federal share.

(c) Other purposes

The non-Federal share of the cost assigned to other project purposes shall be as follows:

(1) hydroelectric power: 100 percent, except that the marketing of such power and the recovery of costs of constructing, operating, maintaining, and rehabilitating such projects shall be in accordance with existing law: *Provided*, That after November 17, 1986, the Secretary shall not submit to Congress any proposal for the authorization of any water resources project that has a hydroelectric power component unless such proposal contains the comments of the appropriate Power Marketing Administrator designated pursuant to section 7152 of Title 42 concerning the appropriate Power Marketing Administration's ability to market the

hydroelectric power expected to be generated and not required in the operation of the project under the applicable Federal power marketing law, so that, 100 percent of operation, maintenance and replacement costs, 100 percent of the capital investment allocated to the purpose of hydroelectric power (with interest at rates established pursuant to or prescribed by applicable law), and any other costs assigned in accordance with law for return from power revenues can be returned within the period set for the return of such costs by or pursuant to such applicable Federal power marketing law;

(2) municipal and industrial water supply: 100 percent;

(3) agricultural water supply: 35 percent;

(4) recreation, including recreational navigation: 50 percent of separable costs and, in the case of any harbor or inland harbor or channel project, 50 percent of joint and separable costs allocated to recreational navigation;

(5) hurricane and storm damage reduction: 35 percent;

(6) aquatic plant control: 50 percent of control operations; and

(7) environmental protection and restoration: 35 percent; except that nothing in this paragraph shall affect or limit the applicability of section 2283 of this title.

(d) Certain other costs assigned to project purposes

(1) Construction

Costs of constructing projects or measures for beach erosion control and water quality enhancement shall be assigned to appropriate project purposes listed in subsections (a), (b), and (c) and shall be shared in the same percentage as the purposes to which the costs are assigned, except that all costs assigned to benefits to privately owned shores (where use of such shores is limited to private interests) or to prevention of losses of private lands shall be borne by non-Federal interests and all costs assigned to the protection of federally owned shores shall be borne by the United States.

(2) Periodic nourishment

(A) In general

In the case of a project authorized for construction after December 31, 1999, except for a project for which a District Engineer's Report is completed by that date, the non-Federal cost of the periodic nourishment of the project, or any measure for shore protection or beach erosion control for the project, that is carried out--

(i) after January 1, 2001, shall be 40 percent;

(ii) after January 1, 2002, shall be 45 percent; and

(iii) after January 1, 2003, shall be 50 percent.

(B) Benefits to privately owned shores

All costs assigned to benefits of periodic nourishment projects or measures to privately owned shores (where use of such shores is limited to private interests) or to prevention of losses of private land shall be borne by the non-Federal interest.

(C) Benefits to Federally owned shores

All costs assigned to the protection of federally owned shores for periodic nourishment measures shall be borne by the United States.

(e) Applicability

(1) In general

This section applies to any project (including any small project which is not specifically authorized by Congress and for which the Secretary has not approved funding before November 17, 1986), or separable element thereof, on which physical construction is initiated after April 30, 1986, as determined by the Secretary, except as provided in paragraph (2). For the purpose of the preceding sentence, physical construction shall be considered to be initiated on the date of the award of a construction contract.

(2) Exceptions

This section shall not apply to the Yazoo Basin, Mississippi, Demonstration Erosion Control Program, authorized by Public Law 98-8, or to

the Harlan, Kentucky, or Barbourville, Kentucky, elements of the project authorized by section 202 of Public Law 96-367.

(f) "Separable element" defined

For purposes of this Act, the term "separable element" means a portion of a project--

(1) which is physically separable from other portions of the project; and

(2) which--

(A) achieves hydrologic effects, or

(B) produces physical or economic benefits, which are separately identifiable from those produced by other portions of the project.

(g) Deferral of payment

(1) With respect to the projects listed in paragraph (2), no amount of the non-Federal share required under this section shall be required to be paid during the three-year period beginning on November 17, 1986.

(2) The projects referred to in paragraph (1) are the following:

(A) Boeuf and Tensas Rivers, Tensas Basin, Louisiana and Arkansas, authorized by the Flood Control Act of 1946;

(B) Eight Mile Creek, Arkansas, authorized by Public Law 99-88; and

(C) Rocky Bayou Area, Yazoo Backwater Area, Yazoo Basin, Mississippi, authorized by the Flood Control Act approved August 18, 1941.

(h) Assigned joint and separable costs

The share of the costs specified under this section for each project purpose shall apply to the joint and separable costs of construction of each project assigned to that purpose, except as otherwise specified in this Act.

(i) Lands, easements, rights-of-way, dredged material disposal areas, and relocations

Except as provided under section 2283(c) of this title, the non-Federal interests for a project to which this section applies shall provide all lands, easements, rights-of-way, and dredged material disposal areas required for the project and perform all necessary relocations, except to the extent limited by any provision of this section. The value of any contribution under the preceding sentence shall be included in the non-Federal share of the project specified in this section.

(j) Agreement

(1) Requirement for agreement

Any project to which this section applies (other than a project for hydroelectric power) shall be initiated only after non-Federal interests have entered into binding agreements with the Secretary to pay 100 percent of the operation, maintenance, and replacement and rehabilitation costs of the project, to pay the non-Federal share of the costs of construction required by this section, and to hold and save the United States free from damages due to the construction or operation and maintenance of the project, except for damages due to the fault or negligence of the United States or its contractors.

(2) Elements of agreement

The agreement required pursuant to paragraph (1) shall be in accordance with the requirements of section 1962d-5b of Title 42 and shall provide for the rights and duties of the United States and the non-Federal interest with respect to the construction, operation, and maintenance of the project, including, but not limited to, provisions specifying that, in the event the non-Federal interest fails to provide the required non-Federal share of costs for such work, the Secretary--

(A) shall terminate or suspend work on the project unless the Secretary determines that continuation of the work is in the interest of the United States or is necessary in order to satisfy agreements with other non-Federal interests in connection with the project; and

(B) may terminate or adjust the rights and privileges of the non-Federal interest to project outputs under the terms of the agreement.

(k) Payment options

Except as otherwise provided in this section, the Secretary may permit the full non-Federal contribution to be made without interest during construction of the project or separable element, or with interest at a rate determined pursuant to section 2216 of this title over a period of not more than thirty years from the date of completion of the project or separable element. Repayment contracts shall provide for recalculation of the interest rate at five-year intervals.

(l) Delay of initial payment

At the request of any non-Federal interest the Secretary may permit such non-Federal interest to delay the initial payment of any non-Federal contribution under this section or section 2211 of this title for up to one year after the date when construction is begun on the project for which such contribution is to be made. Any such delay in initial payment shall be subject to interest charges for up to six months at a rate determined pursuant to section 2216 of this title.

(m) Ability to pay

(1) In general

Any cost-sharing agreement under this section for a feasibility study, or for construction of an environmental protection and restoration project, a flood control project, a project for navigation, storm damage protection, shoreline erosion, hurricane protection, or recreation, or an agricultural water supply project, shall be subject to the ability of the non-Federal interest to pay.

(2) Criteria and procedures

The ability of a non-Federal interest to pay shall be determined by the Secretary in accordance with criteria and procedures in effect under paragraph (3) on the day before December 11, 2000; except that such criteria and procedures shall be revised, and new criteria and procedures shall be developed, not later than December 31, 2007, to reflect the requirements of such paragraph (3).

(3) Revision of criteria and procedures

In revising criteria and procedures pursuant to paragraph (2), the Secretary--

(A) shall consider--

(i) per capita income data for the county or counties in which the project is to be located; and

(ii) the per capita non-Federal cost of construction of the project for the county or counties in which the project is to be located; and

(B) may consider additional criteria relating to the non-Federal interest's financial ability to carry out its cost-sharing responsibilities, to the extent that the application of such criteria does not eliminate areas from eligibility for a reduction in the non-Federal share as determined under subparagraph (A).

(4) Non-Federal share

Notwithstanding subsection (a), the Secretary may reduce the requirement that a non-Federal interest make a cash contribution for any project that is determined to be eligible for a reduction in the non-Federal share under criteria and procedures in effect under paragraphs (1), (2), and (3).

(n) Non-Federal contributions

(1) Prohibition on solicitation of excess contributions

The Secretary may not--

(A) solicit contributions from non-Federal interests for costs of constructing authorized water resources projects or measures in excess of the non-Federal share assigned to the appropriate project purposes listed in subsections (a), (b), and (c); or

(B) condition Federal participation in such projects or measures on the receipt of such contributions.

(2) Limitation on statutory construction

Nothing in this subsection shall be construed to affect the Secretary's authority under section 903(c).

CREDIT(S)

(Pub.L. 99-662, Title I, § 103, Nov. 17, 1986, 100 Stat. 4084; Pub.L. 101-640, Title III, § 305(a), Nov. 28, 1990, 104 Stat. 4635; Pub.L. 102-580, Title II, § 201(a), Title III, § 333(b)(2), Oct. 31, 1992, 106 Stat. 4825, 4852; Pub.L. 104-303, Title II, §§ 202(a)(1)(A), (2), (b)(1), 210(a), Oct. 12, 1996, 110 Stat. 3673, 3681; Pub.L. 106-53, Title II, §§ 215(a), 219(c), Aug. 17, 1999, 113 Stat. 292, 295; Pub.L. 106-109, § 5, Nov. 24, 1999, 113 Stat. 1495; Pub.L. 106-541, Title II, § 204, Dec. 11, 2000, 114 Stat. 2589; Pub.L. 110-114, Title II, §§ 2001, 2019(a), Nov. 8, 2007, 121 Stat. 1067, 1078.)

Notes of Decisions (2)

33 U.S.C.A. § 2213, 33 USCA § 2213

Current through P.L. 115-231. Also includes P.L. 115-233 to 115-270 and 115-272 to 115-277. Title 26 current through P.L. 115-277.

33 U.S.C.A. § 2219

§ 2219. Definitions

Currentness

For purposes of this subchapter, terms shall have the meanings given by section 2241 of this title.

CREDIT(S)

(Pub.L. 99-662, Title I, § 109, Nov. 17, 1986, 100 Stat. 4089.)

33 U.S.C.A. § 2219, 33 USCA § 2219

Current through P.L. 115-231. Also includes P.L. 115-233 to 115-270 and 115-272 to 115-277. Title 26 current through P.L. 115-277.

33 U.S.C.A. § 2241

§ 2241. Definitions

Effective: October 12, 1996
Currentness

For purposes of this subchapter--

(1) Deep-draft harbor

The term "deep-draft harbor" means a harbor which is authorized to be constructed to a depth of more than 45 feet (other than a project which is authorized by section 202 of this title).

(2) Eligible operations and maintenance

(A) Except as provided in subparagraph (B), the term "eligible operations and maintenance" means all Federal operations, maintenance, repair, and rehabilitation, including (i) maintenance dredging reasonably necessary to maintain the width and nominal depth of any harbor or inland harbor; (ii) the construction of dredged material disposal facilities that are necessary for the operation and maintenance of any harbor or inland harbor; (iii) dredging and disposing of contaminated sediments that are in or that affect the maintenance of Federal navigation channels; (iv) mitigating for impacts resulting from Federal navigation operation and maintenance activities; and (v) operating and maintaining dredged material disposal facilities.

(B) As applied to the Saint Lawrence Seaway, the term "eligible operations and maintenance"

means all operations, maintenance, repair, and rehabilitation, including maintenance dredging reasonably necessary to keep such Seaway or navigation improvements operated or maintained by the Saint Lawrence Seaway Development Corporation in operation and reasonable state of repair.

(C) The term "eligible operations and maintenance" does not include providing any lands, easements, or rights-of-way, or performing relocations required for project operations and maintenance.

(3) General cargo harbor

The term "general cargo harbor" means a harbor for which a project is authorized by section 202 of this title and any other harbor which is authorized to be constructed to a depth of more than 20 feet but not more than 45 feet;

(4) Harbor

The term "harbor" means any channel or harbor, or element thereof, in the United States, capable of being utilized in the transportation of commercial cargo in domestic or foreign waterborne commerce by commercial vessels. The term does not include--

(A) an inland harbor;

(B) the Saint Lawrence Seaway;

(C) local access or berthing channels;

(D) channels or harbors constructed or maintained by nonpublic interests; and

(E) any portion of the Columbia River other than the channels on the downstream side of Bonneville lock and dam.

(5) Inland harbor

The term "inland harbor" means a navigation project which is used principally for the accommodation of commercial vessels and the receipt and shipment of waterborne cargoes on inland waters. The term does not include--

(A) projects on the Great Lakes;

(B) projects that are subject to tidal influence;

(C) projects with authorized depths of greater than 20 feet;

(D) local access or berthing channels; and

(E) projects constructed or maintained by nonpublic interests.

(6) Nominal depth

The term "nominal depth" means, in relation to the stated depth for any navigation improvement project, such depth, including any greater depths which must be maintained for any harbor or inland harbor or element thereof included within such project in order to ensure the safe passage at mean low tide of any vessel requiring the stated depth.

(7) Non-Federal interest

The term "non-Federal interest" has the meaning such term has under section 1962d-5b of Title 42

and includes any interstate agency and port authority established under a compact entered into between two or more States with the consent of Congress under section 10 of Article I of the Constitution.

(8) United States

The term "United States" means all areas included within the territorial boundaries of the United States, including the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, the Northern Mariana Islands, and any other territory or possession over which the United States exercises jurisdiction.

CREDIT(S)

(Pub.L. 99-662, Title II, § 214, Nov. 17, 1986, 100 Stat. 4108; Pub.L. 104-303, Title II, § 201(e), Oct. 12, 1996, 110 Stat. 3672.)

33 U.S.C.A. § 2241, 33 USCA § 2241

Current through P.L. 115-231. Also includes P.L. 115-233 to 115-270 and 115-272 to 115-277. Title 26 current through P.L. 115-277.

33 U.S.C.A. § 2283

§ 2283. Fish and wildlife mitigation

Effective: November 8, 2007 to June 9, 2014

(a) Steps to be taken prior to or concurrently with construction

(1) In the case of any water resources project which is authorized to be constructed by the Secretary before, on, or after November 17, 1986, construction of which has not commenced as of November 17, 1986, and which necessitates the mitigation of fish and wildlife losses, including the acquisition of lands or interests in lands to mitigate losses to fish and wildlife, as a result of such project, such mitigation, including acquisition of the lands or interests--

(A) shall be undertaken or acquired before any construction of the project (other than such acquisition) commences, or

(B) shall be undertaken or acquired concurrently with lands and interests in lands for project purposes (other than mitigation of fish and wildlife losses),

whichever the Secretary determines is appropriate, except that any physical construction required for the purposes of mitigation may be undertaken concurrently with the physical construction of such project.

(2) For the purposes of this subsection, any project authorized before November 17, 1986, on which more than 50 percent of the land needed

for the project, exclusive of mitigation lands, has been acquired shall be deemed to have commenced construction under this subsection.

(b) Acquisition of lands or interests in lands for mitigation

(1) After consultation with appropriate Federal and non-Federal agencies, the Secretary is authorized to mitigate damages to fish and wildlife resulting from any water resources project under his jurisdiction, whether completed, under construction, or to be constructed. Such mitigation may include the acquisition of lands, or interests therein, except that--

(A) acquisition under this paragraph shall not be by condemnation in the case of projects completed as of November 17, 1986, or on which at least 10 percent of the physical construction on the project has been completed as of November 17, 1986; and

(B) acquisition of water, or interests therein, under this paragraph, shall not be by condemnation.

The Secretary, shall, under the terms of this paragraph, obligate no more than $30,000,000 in any fiscal year. With respect to any water resources project, the authority under this subsection shall not apply to measures that cost more than $7,500,000 or 10 percent of the cost of the project, whichever is greater.

(2) Whenever, after his review, the Secretary determines that such mitigation features under

this subsection are likely to require condemnation under subparagraph (A) or (B) of paragraph (1) of this subsection, the Secretary shall transmit to Congress a report on such proposed modification, together with his recommendations.

(c) Allocation of mitigation costs

Costs incurred after November 17, 1986, including lands, easements, rights-of-way, and relocations, for implementation and operation, maintenance, and rehabilitation to mitigate damages to fish and wildlife shall be allocated among authorized project purposes in accordance with applicable cost allocation procedures, and shall be subject to cost sharing or reimbursement to the same extent as such other project costs are shared or reimbursed, except that when such costs are covered by contracts entered into prior to November 17, 1986, such costs shall not be recovered without the consent of the non-Federal interests or until such contracts are complied with or renegotiated.

(d) Mitigation plans as part of project proposals

(1) In general

After November 17, 1986, the Secretary shall not submit any proposal for the authorization of any water resources project to Congress in any report, and shall not select a project alternative in any report, unless such report contains (A) a recommendation with a specific plan to mitigate fish and wildlife losses created by such project, or (B) a determination by the Secretary that such project will have negligible adverse impact on fish

and wildlife. Specific mitigation plans shall ensure that impacts to bottomland hardwood forests are mitigated in-kind, and other habitat types are mitigated to not less than in-kind conditions, to the extent possible. In carrying out this subsection, the Secretary shall consult with appropriate Federal and non-Federal agencies.

(2) Design of mitigation projects

The Secretary shall design mitigation projects to reflect contemporary understanding of the science of mitigating the adverse environmental impacts of water resources projects.

(3) Mitigation requirements

(A) In general

To mitigate losses to flood damage reduction capabilities and fish and wildlife resulting from a water resources project, the Secretary shall ensure that the mitigation plan for each water resources project complies with the mitigation standards and policies established pursuant to the regulatory programs administered by the Secretary.

(B) Inclusions

A specific mitigation plan for a water resources project under paragraph (1) shall include, at a minimum--

(i) a plan for monitoring the implementation and ecological success of each mitigation measure, including the cost and duration of any monitoring, and,

to the extent practicable, a designation of the entities that will be responsible for the monitoring;

(ii) the criteria for ecological success by which the mitigation will be evaluated and determined to be successful based on replacement of lost functions and values of the habitat, including hydrologic and vegetative characteristics;

(iii) a description of the land and interests in land to be acquired for the mitigation plan and the basis for a determination that the land and interests are available for acquisition;

(iv) a description of--

(I) the types and amount of restoration activities to be conducted;

(II) the physical action to be undertaken to achieve the mitigation objectives within the watershed in which such losses occur and, in any case in which the mitigation will occur outside the watershed, a detailed explanation for undertaking the mitigation outside the watershed; and

(III) the functions and values that will result from the mitigation plan; and

(v) a contingency plan for taking corrective actions in cases in which monitoring demonstrates that mitigation measures are

not achieving ecological success in accordance with criteria under clause (ii).

(C) Responsibility for monitoring

In any case in which it is not practicable to identify in a mitigation plan for a water resources project the entity responsible for monitoring at the time of a final report of the Chief of Engineers or other final decision document for the project, such entity shall be identified in the partnership agreement entered into with the non-Federal interest under section 1962d-5b of Title 42.

(4) Determination of success

(A) In general

A mitigation plan under this subsection shall be considered to be successful at the time at which the criteria under paragraph (3)(B)(ii) are achieved under the plan, as determined by monitoring under paragraph (3)(B)(i).

(B) Consultation

In determining whether a mitigation plan is successful under subparagraph (A), the Secretary shall consult annually with appropriate Federal agencies and each State in which the applicable project is located on at least the following:

(i) The ecological success of the mitigation as of the date on which the report is submitted.

(ii) The likelihood that the mitigation will achieve ecological success, as defined in the mitigation plan.

(iii) The projected timeline for achieving that success.

(iv) Any recommendations for improving the likelihood of success.

(5) Monitoring

Mitigation monitoring shall continue until it has been demonstrated that the mitigation has met the ecological success criteria.

(e) First enhancement costs as Federal costs

In those cases when the Secretary, as part of any report to Congress, recommends activities to enhance fish and wildlife resources, the first costs of such enhancement shall be a Federal cost when--

(1) such enhancement provides benefits that are determined to be national, including benefits to species that are identified by the National Marine Fisheries Service as of national economic importance, species that are subject to treaties or international convention to which the United States is a party, and anadromous fish;

(2) such enhancement is designed to benefit species that have been listed as threatened or endangered by the Secretary of the Interior under the terms of the Endangered Species Act, as amended (16 U.S.C. 1531, et seq.), or

(3) such activities are located on lands managed as a national wildlife refuge.

When benefits of enhancement do not qualify under the preceding sentence, 25 percent of such first costs of enhancement shall be provided by non-Federal interests under a schedule of reimbursement determined by the Secretary. Not more than 80 percent of the non-Federal share of such first costs may be satisfied through in-kind contributions, including facilities, supplies, and services that are necessary to carry out the enhancement project. The non-Federal share of operation, maintenance, and rehabilitation of activities to enhance fish and wildlife resources shall be 25 percent.

(f) National benefits from enhancement measures for Atchafalaya Floodway System and Mississippi Delta Region projects

Fish and wildlife enhancement measures carried out as part of the project for Atchafalaya Floodway System, Louisiana, authorized by Public Law 99-88, and the project for Mississippi Delta Region, Louisiana, authorized by the Flood Control Act of 1965, shall be considered to provide benefits that are national for purposes of this section.

(g) Fish and Wildlife Coordination Act supplementation

The provisions of subsections (a), (b), and (d) of this section shall be deemed to supplement the responsibility and authority of the Secretary pursuant to the Fish and Wildlife Coordination Act [16 U.S.C.A. § 661 et seq.], and nothing in this section is intended to affect that Act.

CREDIT(S)

(Pub.L. 99-662, Title IX, § 906, Nov. 17, 1986, 100 Stat. 4186; Pub.L. 102-580, Title III, § 333(a), Oct. 31, 1992, 106 Stat. 4852; Pub.L. 106-53, Title II, § 221, Aug. 17, 1999, 113 Stat. 295; Pub.L. 106-541, Title II, § 224(a), Dec. 11, 2000, 114 Stat. 2597; Pub.L. 110-114, Title II, § 2036(a), Nov. 8, 2007, 121 Stat. 1092.)

33 U.S.C.A. § 2283, 33 USCA § 2283

Current through P.L. 115-231. Also includes P.L. 115-233 to 115-270 and 115-272 to 115-277. Title 26 current through P.L. 115-277.

33 U.S.C.A. § 2283

§ 2283. Fish and wildlife mitigation

Effective: December 16, 2016
Currentness

(a) Steps to be taken prior to or concurrently with construction

(1) In the case of any water resources project which is authorized to be constructed by the Secretary before, on, or after November 17, 1986, construction of which has not commenced as of November 17, 1986, and which necessitates the mitigation of fish and wildlife losses, including the acquisition of lands or interests in lands to mitigate losses to fish and wildlife, as a result of such project, such mitigation, including acquisition of the lands or interests--

(A) shall be undertaken or acquired before any construction of the project (other than such acquisition) commences, or

(B) shall be undertaken or acquired concurrently with lands and interests in lands for project purposes (other than mitigation of fish and wildlife losses),

whichever the Secretary determines is appropriate, except that any physical construction required for the purposes of mitigation may be undertaken concurrently with the physical construction of such project.

(2) For the purposes of this subsection, any project authorized before November 17, 1986, on

which more than 50 percent of the land needed for the project, exclusive of mitigation lands, has been acquired shall be deemed to have commenced construction under this subsection.

(b) Acquisition of lands or interests in lands for mitigation

(1) After consultation with appropriate Federal and non-Federal agencies, the Secretary is authorized to mitigate damages to fish and wildlife resulting from any water resources project under his jurisdiction, whether completed, under construction, or to be constructed. Such mitigation may include the acquisition of lands, or interests therein, except that--

(A) acquisition under this paragraph shall not be by condemnation in the case of projects completed as of November 17, 1986, or on which at least 10 percent of the physical construction on the project has been completed as of November 17, 1986; and

(B) acquisition of water, or interests therein, under this paragraph, shall not be by condemnation.

The Secretary, shall, under the terms of this paragraph, obligate no more than $30,000,000 in any fiscal year. With respect to any water resources project, the authority under this subsection shall not apply to measures that cost more than $7,500,000 or 10 percent of the cost of the project, whichever is greater.

(2) Whenever, after his review, the Secretary determines that such mitigation features under this subsection are likely to require condemnation under subparagraph (A) or (B) of paragraph (1) of this subsection, the Secretary shall transmit to Congress a report on such proposed modification, together with his recommendations.

(c) Allocation of mitigation costs

Costs incurred after November 17, 1986, including lands, easements, rights-of-way, and relocations, for implementation and operation, maintenance, and rehabilitation to mitigate damages to fish and wildlife shall be allocated among authorized project purposes in accordance with applicable cost allocation procedures, and shall be subject to cost sharing or reimbursement to the same extent as such other project costs are shared or reimbursed, except that when such costs are covered by contracts entered into prior to November 17, 1986, such costs shall not be recovered without the consent of the non-Federal interests or until such contracts are complied with or renegotiated.

(d) Mitigation plans as part of project proposals

(1) In general

After November 17, 1986, the Secretary shall not submit any proposal for the authorization of any water resources project to Congress in any report, and shall not select a project alternative in any report, unless such report contains (A) a recommendation with a specific plan to mitigate

for damages to ecological resources, including terrestrial and aquatic resources, and fish and wildlife losses created by such project, or (B) a determination by the Secretary that such project will have negligible adverse impact on ecological resources and fish and wildlife without the implementation of mitigation measures. Specific mitigation plans shall ensure that impacts to bottomland hardwood forests are mitigated in-kind, and other habitat types are mitigated to not less than in-kind conditions, to the extent possible. If the Secretary determines that mitigation to in-kind conditions is not possible, the Secretary shall identify in the report the basis for that determination and the mitigation measures that will be implemented to meet the requirements of this section and the goals of section 2317(a)(1) of this title. In carrying out this subsection, the Secretary shall consult with appropriate Federal and non-Federal agencies.

(2) Selection and design of mitigation projects

The Secretary shall select and design mitigation projects using a watershed approach to reflect contemporary understanding of the science of mitigating the adverse environmental impacts of water resources projects.

(3) Mitigation requirements

(A) In general

To mitigate losses to flood damage reduction capabilities and fish and wildlife resulting from a water resources project, the Secretary

shall ensure that the mitigation plan for each water resources project complies with, at a minimum, the mitigation standards and policies established pursuant to the regulatory programs administered by the Secretary.

(B) Inclusions

A specific mitigation plan for a water resources project under paragraph (1) shall include, at a minimum--

(i) a plan for monitoring the implementation and ecological success of each mitigation measure, including the cost and duration of any monitoring, and, to the extent practicable, a designation of the entities that will be responsible for the monitoring;

(ii) the criteria for ecological success by which the mitigation will be evaluated and determined to be successful based on replacement of lost functions and values of the habitat, including hydrologic and vegetative characteristics;

(iii) for projects where mitigation will be carried out by the Secretary--

(I) a description of the land and interest in land to be acquired for the mitigation plan;

(II) the basis for a determination that the land and interests are available for acquisition; and

(III) a determination that the proposed interest sought does not exceed the minimum interest in land necessary to meet the mitigation requirements for the project;

(iv) for projects where mitigation will be carried out through a third party mitigation arrangement in accordance with subsection (i)--

(I) a description of the third party mitigation instrument to be used; and

(II) the basis for a determination that the mitigation instrument can meet the mitigation requirements for the project;

(v) a description of--

(I) the types and amount of restoration activities to be conducted;

(II) the physical action to be undertaken to achieve the mitigation objectives within the watershed in which such losses occur and, in any case in which the mitigation will occur outside the watershed, a detailed explanation for undertaking the mitigation outside the watershed; and

(III) the functions and values that will result from the mitigation plan; and

(vi) a contingency plan for taking corrective actions in cases in which monitoring demonstrates that mitigation

measures are not achieving ecological success in accordance with criteria under clause (ii).

(C) Responsibility for monitoring

In any case in which it is not practicable to identify in a mitigation plan for a water resources project the entity responsible for monitoring at the time of a final report of the Chief of Engineers or other final decision document for the project, such entity shall be identified in the partnership agreement entered into with the non-Federal interest under section 1962d-5b of Title 42.

(4) Determination of success

(A) In general

A mitigation plan under this subsection shall be considered to be successful at the time at which the criteria under paragraph (3)(B)(ii) are achieved under the plan, as determined by monitoring under paragraph (3)(B)(i).

(B) Consultation

In determining whether a mitigation plan is successful under subparagraph (A), the Secretary shall consult annually with appropriate Federal agencies and each State in which the applicable project is located on at least the following:

(i) The ecological success of the mitigation as of the date on which the report is submitted.

(ii) The likelihood that the mitigation will achieve ecological success, as defined in the mitigation plan.

(iii) The projected timeline for achieving that success.

(iv) Any recommendations for improving the likelihood of success.

(5) Monitoring

Mitigation monitoring shall continue until it has been demonstrated that the mitigation has met the ecological success criteria.

(e) First enhancement costs as Federal costs

In those cases when the Secretary, as part of any report to Congress, recommends activities to enhance fish and wildlife resources, the first costs of such enhancement shall be a Federal cost when--

(1) such enhancement provides benefits that are determined to be national, including benefits to species that are identified by the National Marine Fisheries Service as of national economic importance, species that are subject to treaties or international convention to which the United States is a party, and anadromous fish;

(2) such enhancement is designed to benefit species that have been listed as threatened or endangered by the Secretary of the Interior under the terms of the Endangered Species Act, as amended (16 U.S.C. 1531, et seq.), or

(3) such activities are located on lands managed as a national wildlife refuge.

When benefits of enhancement do not qualify under the preceding sentence, 25 percent of such first costs of enhancement shall be provided by non-Federal interests under a schedule of reimbursement determined by the Secretary. Not more than 80 percent of the non-Federal share of such first costs may be satisfied through in-kind contributions, including facilities, supplies, and services that are necessary to carry out the enhancement project. The non-Federal share of operation, maintenance, and rehabilitation of activities to enhance fish and wildlife resources shall be 25 percent.

(f) National benefits from enhancement measures for Atchafalaya Floodway System and Mississippi Delta Region projects

Fish and wildlife enhancement measures carried out as part of the project for Atchafalaya Floodway System, Louisiana, authorized by Public Law 99-88, and the project for Mississippi Delta Region, Louisiana, authorized by the Flood Control Act of 1965, shall be considered to provide benefits that are national for purposes of this section.

(g) Fish and Wildlife Coordination Act supplementation

The provisions of subsections (a), (b), and (d) shall be deemed to supplement the responsibility and authority of the Secretary pursuant to the Fish and Wildlife Coordination Act [16 U.S.C.A. § 661 et seq.], and nothing in this section is intended to affect that Act.

(h) Programmatic mitigation plans

(1) In general

The Secretary may develop programmatic mitigation plans to address the potential impacts to ecological resources, fish, and wildlife associated with existing or future Federal water resources development projects.

(2) Use of mitigation plans

The Secretary shall, to the maximum extent practicable, use programmatic mitigation plans developed in accordance with this subsection to guide the development of a mitigation plan under subsection (d).

(3) Non-Federal plans

The Secretary shall, to the maximum extent practicable and subject to all conditions of this subsection, use programmatic environmental plans developed by a State, a body politic of the State, which derives its powers from a State constitution, a government entity created by State legislation, or a local government, that meet the requirements of this subsection to address the potential environmental impacts of existing or future water resources development projects.

(4) Scope

A programmatic mitigation plan developed by the Secretary or an entity described in paragraph (3) to address potential impacts of existing or future water resources development projects shall, to the maximum extent practicable--

(A) be developed on a regional, ecosystem, watershed, or statewide scale;

(B) include specific goals for aquatic resource and fish and wildlife habitat restoration, establishment, enhancement, or preservation;

(C) identify priority areas for aquatic resource and fish and wildlife habitat protection or restoration;

(D) include measures to protect or restore habitat connectivity;

(E) encompass multiple environmental resources within a defined geographical area or focus on a specific resource, such as aquatic resources or wildlife habitat; and

(F) address impacts from all projects in a defined geographical area or focus on a specific type of project.

(5) Consultation

The scope of the plan shall be determined by the Secretary or an entity described in paragraph (3), as appropriate, in consultation with the agency with jurisdiction over the resources being addressed in the environmental mitigation plan.

(6) Contents

A programmatic environmental mitigation plan may include--

(A) an assessment of the condition of environmental resources in the geographical area covered by the plan, including an

assessment of recent trends and any potential threats to those resources;

(B) an assessment of potential opportunities to improve the overall quality of environmental resources in the geographical area covered by the plan through strategic mitigation for impacts of water resources development projects;

(C) standard measures for mitigating certain types of impacts, including impacts to habitat connectivity;

(D) parameters for determining appropriate mitigation for certain types of impacts, such as mitigation ratios or criteria for determining appropriate mitigation sites;

(E) adaptive management procedures, such as protocols that involve monitoring predicted impacts over time and adjusting mitigation measures in response to information gathered through the monitoring;

(F) acknowledgment of specific statutory or regulatory requirements that must be satisfied when determining appropriate mitigation for certain types of resources; and

(G) any offsetting benefits of self-mitigating projects, such as ecosystem or resource restoration and protection.

(7) Process

Before adopting a programmatic environmental mitigation plan for use under this subsection, the Secretary shall--

(A) for a plan developed by the Secretary--

(i) make a draft of the plan available for review and comment by applicable environmental resource agencies and the public; and

(ii) consider any comments received from those agencies and the public on the draft plan; and

(B) for a plan developed under paragraph (3), determine, not later than 180 days after receiving the plan, whether the plan meets the requirements of paragraphs (4) through (6) and was made available for public comment.

(8) Integration with other plans

A programmatic environmental mitigation plan may be integrated with other plans, including watershed plans, ecosystem plans, species recovery plans, growth management plans, and land use plans.

(9) Consideration in project development and permitting

If a programmatic environmental mitigation plan has been developed under this subsection, any Federal agency responsible for environmental reviews, permits, or approvals for a water resources development project may use the recommendations in that programmatic environmental mitigation plan when carrying out the responsibilities of the agency under the

National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(10) Preservation of existing authorities

Nothing in this subsection limits the use of programmatic approaches to reviews under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(11) Effect

Nothing in this subsection--

(A) requires the Secretary to undertake additional mitigation for existing projects for which mitigation has already been initiated, including the addition of fish passage to an existing water resources development project; or

(B) affects the mitigation responsibilities of the Secretary under any other provision of law.

(i) Third-party mitigation arrangements

(1) Eligible activities

In accordance with all applicable Federal laws (including regulations), mitigation efforts carried out under this section may include--

(A) participation in mitigation banking or other third-party mitigation arrangements, such as--

(i) the purchase of credits from commercial or State, regional, or local agency-sponsored mitigation banks; and

(ii) the purchase of credits from in-lieu fee mitigation programs; and

(B) contributions to statewide and regional efforts to conserve, restore, enhance, and create natural habitats and wetlands if the Secretary determines that the contributions will ensure that the mitigation requirements of this section and the goals of section 2317(a)(1) of this title will be met.

(2) Inclusion of other activities

The banks, programs, and efforts described in paragraph (1) include any banks, programs, and efforts developed in accordance with applicable law (including regulations).

(3) Terms and conditions

In carrying out natural habitat and wetlands mitigation efforts under this section, contributions to the mitigation effort may--

(A) take place concurrent with, or in advance of, the commitment of funding to a project; and

(B) occur in advance of project construction only if the efforts are consistent with all applicable requirements of Federal law (including regulations) and water resources development planning processes.

(4) Preference

At the request of the non-Federal project sponsor, preference may be given, to the maximum extent

practicable, to mitigating an environmental impact through the use of a mitigation bank, in-lieu fee, or other third-party mitigation arrangement, if the use of credits from the mitigation bank or in-lieu fee, or the other third-party mitigation arrangement for the project has been approved by the applicable Federal agency.

(j) Use of funds

(1) In general

The Secretary, with the consent of the applicable non-Federal interest, may use funds made available for preconstruction engineering and design after authorization of project construction to satisfy mitigation requirements through third-party arrangements or to acquire interests in land necessary for meeting mitigation requirements under this section.

(2) Notification

Prior to the expenditure of any funds for a project pursuant to paragraph (1), the Secretary shall notify the Committee on Appropriations and the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Appropriations and the Committee on Environment and Public Works of the Senate.

(k) Measures

The Secretary shall consult with interested members of the public, the Director of the United States Fish and Wildlife Service, the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration, States, including State fish and

game departments, and interested local governments to identify standard measures under subsection (h)(6)(C) that reflect the best available scientific information for evaluating habitat connectivity.

CREDIT(S)

(Pub.L. 99-662, Title IX, § 906, Nov. 17, 1986, 100 Stat. 4186; Pub.L. 102-580, Title III, § 333(a), Oct. 31, 1992, 106 Stat. 4852; Pub.L. 106-53, Title II, § 221, Aug. 17, 1999, 113 Stat. 295; Pub.L. 106-541, Title II, § 224(a), Dec. 11, 2000, 114 Stat. 2597; Pub.L. 110-114, Title II, § 2036(a), Nov. 8, 2007, 121 Stat. 1092; Pub.L. 113-121, Title I, § 1040(a), June 10, 2014, 128 Stat. 1239; Pub.L. 114-322, Title I, § 1162, Dec. 16, 2016, 130 Stat. 1668.)

Notes of Decisions (2)

33 U.S.C.A. § 2283, 33 USCA § 2283

Current through P.L. 115-231. Also includes P.L. 115-233 to 115-270 and 115-272 to 115-277. Title 26 current through P.L. 115-277.

42 U.S.C.A. § 1962d-5b

§ 1962d-5b. Written agreement requirement for water resources projects

Effective: November 8, 2007

(a) Cooperation of non-Federal interest

(1) In general

After December 31, 1970, the construction of any water resources project, or an acceptable separable element thereof, by the Secretary of the Army, acting through the Chief of Engineers, or by a non-Federal interest where such interest will be reimbursed for such construction under any provision of law, shall not be commenced until each non-Federal interest has entered into a written partnership agreement with the Secretary (or, where appropriate, the district engineer for the district in which the project will be carried out) under which each party agrees to carry out its responsibilities and requirements for implementation or construction of the project or the appropriate element of the project, as the case may be; except that no such agreement shall be required if the Secretary determines that the administrative costs associated with negotiating, executing, or administering the agreement would exceed the amount of the contribution required from the non-Federal interest and are less than $25,000.

(2) Liquidated damages

A partnership agreement described in paragraph (1) may include a provision for liquidated

damages in the event of a failure of one or more parties to perform.

(3) Obligation of future appropriations

In any partnership agreement described in paragraph (1) and entered into by a State, or a body politic of the State which derives its powers from the State constitution, or a governmental entity created by the State legislature, the agreement may reflect that it does not obligate future appropriations for such performance and payment when obligating future appropriations would be inconsistent with constitutional or statutory limitations of the State or a political subdivision of the State.

(4) Credit for in-kind contributions

(A) In general

A partnership agreement described in paragraph (1) may provide with respect to a project that the Secretary shall credit toward the non-Federal share of the cost of the project, including a project implemented without specific authorization in law, the value of in-kind contributions made by the non-Federal interest, including--

(i) the costs of planning (including data collection), design, management, mitigation, construction, and construction services that are provided by the non-Federal interest for implementation of the project;

(ii) the value of materials or services provided before execution of the partnership agreement, including efforts

on constructed elements incorporated into the project; and

(iii) the value of materials and services provided after execution of the partnership agreement.

(B) Condition

The Secretary may credit an in-kind contribution under subparagraph (A) only if the Secretary determines that the material or service provided as an in-kind contribution is integral to the project.

(C) Work performed before partnership agreement

In any case in which the non-Federal interest is to receive credit under subparagraph (A)(ii) for the cost of work carried out by the non-Federal interest and such work has not been carried out as of November 8, 2007, the Secretary and the non-Federal interest shall enter into an agreement under which the non-Federal interest shall carry out such work, and only work carried out following the execution of the agreement shall be eligible for credit.

(D) Limitations

Credit authorized under this paragraph for a project--

(i) shall not exceed the non-Federal share of the cost of the project;

(ii) shall not alter any other requirement that a non-Federal interest provide lands,

easements, relocations, rights-of-way, or areas for disposal of dredged material for the project;

(iii) shall not alter any requirement that a non-Federal interest pay a portion of the costs of construction of the project under sections 2211 and 2213 of Title 33; and

(iv) shall not exceed the actual and reasonable costs of the materials, services, or other things provided by the non-Federal interest, as determined by the Secretary.

(E) Applicability

(i) In general

This paragraph shall apply to water resources projects authorized after November 16, 1986, including projects initiated after November 16, 1986, without specific authorization in law.

(ii) Limitation

In any case in which a specific provision of law provides for a non-Federal interest to receive credit toward the non-Federal share of the cost of a study for, or construction or operation and maintenance of, a water resources project, the specific provision of law shall apply instead of this paragraph.

(b) Definition of non-Federal interest

The term "non-Federal interest" means--

(1) a legally constituted public body (including a federally recognized Indian tribe); or

(2) a nonprofit entity with the consent of the affected local government,

that has full authority and capability to perform the terms of its agreement and to pay damages, if necessary, in the event of failure to perform.

(c) Enforcement; jurisdiction

Every agreement entered into pursuant to this section shall be enforcible in the appropriate district court of the United States.

(d) Nonperformance of terms of agreement by non-Federal interest; notice; reasonable opportunity for performance; performance by Chief of Engineers

After commencement of construction of a project, the Chief of Engineers may undertake performance of those items of cooperation necessary to the functioning of the project for its purposes, if he has first notified the non-Federal interest of its failure to perform the terms of its agreement and has given such interest a reasonable time after such notification to so perform.

(e) Delegation of authority

Not later than June 30, 2008, the Secretary shall issue policies and guidelines for partnership agreements that delegate to the district engineers, at a minimum--

(1) the authority to approve any policy in a partnership agreement that has appeared in an agreement previously approved by the Secretary;

(2) the authority to approve any policy in a partnership agreement the specific terms of

which are dictated by law or by a final feasibility study, final environmental impact statement, or other final decision document for a water resources project;

(3) the authority to approve any partnership agreement that complies with the policies and guidelines issued by the Secretary; and

(4) the authority to sign any partnership agreement for any water resources project unless, within 30 days of the date of authorization of the project, the Secretary notifies the district engineer in which the project will be carried out that the Secretary wishes to retain the prerogative to sign the partnership agreement for that project.

(f) Report to Congress

Not later than 2 years after November 8, 2007, and every year thereafter, the Secretary shall submit to Congress a report detailing the following:

(1) The number of partnership agreements signed by district engineers and the number of partnership agreements signed by the Secretary.

(2) For any partnership agreement signed by the Secretary, an explanation of why delegation to the district engineer was not appropriate.

(g) Public availability

Not later than 120 days after November 8, 2007, the Chief of Engineers shall--

(1) ensure that each district engineer has made available to the public, including on the Internet,

all partnership agreements entered into under this section within the preceding 10 years and all partnership agreements for water resources projects currently being carried out in that district; and

(2) make each partnership agreement entered into after November 8, 2007, available to the public, including on the Internet, not later than 7 days after the date on which such agreement is entered into.

(h) Effective date

This section shall not apply to any project the construction of which was commenced before January 1, 1972, or to the assurances for future demands required by the Water Supply Act of 1958, as amended [43 U.S.C.A. § 390b].

CREDIT(S)

(Pub.L. 91-611, Title II, § 221, Dec. 31, 1970, 84 Stat. 1831; Pub.L. 92-222, § 4, Dec. 23, 1971, 85 Stat. 799; Pub.L. 99-662, Title IX, § 912(a), Nov. 17, 1986, 100 Stat. 4189; Pub.L. 104-106, Div. A, Title X, § 1064(d), Feb. 10, 1996, 110 Stat. 445; Pub.L. 104-303, Title II, § 220, Oct. 12, 1996, 110 Stat. 3696; Pub.L. 106-541, Title II, § 201, Dec. 11, 2000, 114 Stat. 2587; Pub.L. 110-114, Title II, § 2003(a) to (c), Nov. 8, 2007, 121 Stat. 1067.)

42 U.S.C.A. § 1962d-5b, 42 USCA § 1962d-5b

Current through P.L. 115-231. Also includes P.L. 115-233 to 115-270 and 115-272 to 115-277. Title 26 current through P.L. 115-277.

DEPARTMENT OF THE ARMY
NEW ORLEANS DISTRICT,
CORPS OF ENGINEERS
P.O. BOX 60267
NEW ORLEANS, LOUISIANA 70160-0267

FEB 20 2013

REPLY TO
ATTENTION OF

Programs and Project Management Division
Protection and Restoration Office

Mr. George W. House
Partner
Brooks, Pierce, McLendon,
Humphrey & Leonard, LLP
2000 Renaissance Plaza
230 North Elm Street
Greensboro, North Carolina 27401

Dear Mr. House:

This is in response to your letter dated November 9, 2012, concerning the Idlewild Stage 2 Borrow Area and its mitigation requirements. The US Army Corps of Engineers (USACE) has previously communicated the mitigation requirements associated with the contractor-furnished borrow program to you and/or others acting on behalf of Idlewild Stage 2 on many occasions, including: a letter sent to Jerry Howell dated November 4, 2010; email correspondence from Danielle Tommaso to Allen McReynolds dated June 24, 2011; correspondence from COL Edward R. Fleming, District Commander, to Tac Carrere dated February 28, 2012; a meeting here at the New Orleans District on July 10, 2012, which was attended by

yourself, Allen McReynolds, J.P. Layrisson, Ann Redmond for White Oak Realty and by Sandra Stiles and Aven Bruser, on behalf of USACE; and an email from Sandra Stiles to Allen McReynolds dated August 21, 2012. Additionally, Individual Environmental Report (IER) #31 discusses the mitigation requirements for the Idlewild Stage 2 site. IER #31 was released to the public in late 2010; it can be found at www.nolaenvironmental.gov.

As previously discussed, if borrow excavated at the Idlewild Stage 2 site is not used in the construction of a US ACE water resources project, there is no USACE requirement that impacts to non-wetland bottomland hardwoods be mitigated. However, impacts to bottomland hardwood forests associated with borrow that will be used in construction of a USACE water resources project must be mitigated through the purchase of mitigation bank credits.

The compensatory mitigation requirements for the contractor-furnished borrow program are based on the enclosed information.

If you have any questions or require additional information regarding this matter, please contact Mr. Thomas A. Holden Jr., P.E., Deputy District Engineer for Project Management at (504) 862-2204.

Sincerely,

/s/

Edward R. Fleming
Colonel, US Army
District Commander

Enclosure

Compensatory Mitigation Requirements for the Contractor-Furnished Borrow Program

1. USACE is required to mitigate for impacts to upland bottomland hardwood forests. The Water Resources Development Act (WRDA) of 1986 (Public Law 99-662) Section 906 requires that USACE mitigate for habitat losses caused by water resources projects. That section specifically states that impacts to bottomland hardwood forests are to be mitigated in kind to the extent possible. Because the statute does not qualify "bottomland hardwood forests" with a limitation that such forests be either wetland or upland, a plain reading of the statute indicates that the term is inclusive of all bottomland hardwood forests, regardless of whether such forests are classified as wet or dry. Additionally, because USACE is already required to mitigate wet bottomland hardwood forests – but not dry bottomland hardwood forests – pursuant to the Clean Water Act (originally enacted in 1972; amended in 1977) and the Clean Water Act Sec. 404(b)(1) Guidelines (promulgated by the Environmental Protection Agency in 1980) if WRDA 1986 requirement only applied to wet bottomland hardwood forests, the requirement would be redundant. To give the WRDA requirement meaning (pursuant to normal rules of statutory interpretation), dry bottomland hardwood forests must be included within the definition of "bottomland hardwood forests."

2. USACE is required to ensure mitigation of impacts to upland bottomland hardwood forests that are caused through excavation, processing or transportation of borrow material for construction of

water resources projects. In order to facilitate the use of vast amounts of borrow material needed to construct the Hurricane and Storm Damage Risk Reduction System (HSDRRS), USACE determined that it was in the best interest of the Government for certain construction contracts to require the contractor to furnish its own borrow material. In such instances, the contractor had to identify borrow sources with geotechnically suitable material, demonstrate that the borrow pit area had been evaluated for impacts to the environment in accordance with the National Environmental Policy Act, and other laws, and make its own arrangements with the landowner. In order to expedite this process, USACE was willing to pre-evaluate potential contractor-furnished sources for borrow material for HSDRRS construction. A key component of this pre-evaluation was to ensure that contractors and landowners understood that they would be required to fulfill any compensatory mitigation requirements associated with the excavation of borrow to be used in HSDRRS construction.

3. Because the purchase of mitigation bank credits is preferred by both statute and regulation to individual mitigation projects; and because it is the most efficient, timely and effective means to achieve the required compensatory mitigation for impacts caused by excavation of borrow that is to be used in HSDRRS construction, USACE requires that mitigation be accomplished through the purchase of bank credits. Support for this determination may be found in the following:

a. The creation and approval of a mitigation plan (which would be required if the

credits were not purchased from a mitigation bank) is a lengthy and detailed process that can take a year or more. (Such mitigation plans also require financial assurances to guarantee mitigation success, which would greatly increase the mitigation costs to the site owner or contractor. Individual mitigation projects also require that a conservation servitude be placed on the site, which would severely impair all future uses.) Not only does USACE not have the manpower to devote to this process for every contractor-furnished borrow site, but it would significantly delay the approval and use of those sites. As use of contractor-furnished borrow was intended to facilitate the time-sensitive HSDRRS mission, there simply was not the time to allow that option. The advantage of mitigation banks is that they have already been approved and credits are readily available.

b. The WRDA of 2007 (Public Law 110-114), Section 2036(c) directs that "In carrying out a water resources project that involves wetlands mitigation and that has impacts that occur within the service area of a mitigation bank, US ACE, where appropriate, shall first consider the use of the mitigation bank ...." US ACE has determined that contractor-furnished borrow is an appropriate instance where mitigation banks should be utilized.

c. Implementation Guidance for WRDA 2007, Section 2036(c) similarly requires that "The purchase of credits from mitigation banks established by others shall be considered first, where appropriate ...." Note that the guidance also states that "Credits for upland resources within a mitigation bank may be available on a limited basis,

and may be used to compensate for upland impacts of Corps Civil Works projects ...."

d. WRDA 2007, Section 2036(a) requires that mitigation plans for civil works projects comply with the mitigation standards and policies of the regulatory program. Like WRDA 2007, our permitting regulations also give preference to mitigation banks over individual mitigation projects. See 33 CFR 332.3.b.2.

e. Mitigation requirements for the Idlewild Stage 2 site are discussed in IER #31, Section 3.2.2 "Non-Jurisdictional Bottomland Hardwood (BLH) Forest" (page 42). Specifically, page 45 states "Compensatory mitigation is required to be completed prior to impacts. The landowners or contractors will accomplish compensatory mitigation through the purchase of mitigation bank credits at an appropriate mitigation bank within the watershed as the impacts." In addition, page 46 states "The landowners of the proposed ... Idlewild Stage 2 ... contractor-furnished borrow [area] will complete mitigation for the loss of non-jurisdictional BLH if [the site is] used for construction of the HSDRRS. Proof of mitigation for non-jurisdictional BLH impacts would be supplied to the CEMVN prior to excavation."

f. In addition to the IER, mitigation requirements for the Idlewild Stage 2 site are highlighted in a letter sent to Mr. Jerry Howell, acting as agent for Idlewild Stage 2, dated November 4, 2010. It states "The Corps has determined that portions of the subject property are non-wetland bottomland hardwood forest habitat. You will be

required to provide proof of mitigation to the Corps' Environmental Branch for impacts to this habitat prior to excavation." This requirement is also included in the contractor-furnished Site Borrow Submittal Environmental Compliance Checklist that is available for all HSDRRS contractors. It was also discussed in multiple instances throughout the planning process to Mr. Howell and the rest of the Idlewild team.


Idlewild, Stage 2 Borrow Area - Plaquemines Parish
N
MISSISSIPPI RIVER
LA HWY 23
HERO CANAL
90 1' 59"
29 46' 59"
90 2' 11"
29 47' 4"
90 2' 32"
29 47' 8"
90 2' 19"
29 46' 23"
90 2' 54"
29 46' 29"
0 500 1,000 2,000 3,000 Feet
Idlewild, Stage 2 Borrow Area
(~108 Acres available for excavation)
Idlewild Stage 2 Borrow Area (~293 Acres)
Idlewild Stage 1 Borrow Area (Approved Under IER #32)
100-foot Wetlands Buffer
Jurisdictional Wetlands (~120 Acres)
Buttonbend Hardwood Forest (~83 Acres)

SCANDURRO & LAYRISSON, L.L.C.
ATTORNEYS AT LAW
607 ST. CHARLES AVENUE
NEW ORLEANS, LOUISIANA 70130
TELEPHONE: 504.522.7100
FACSIMILE: 504.529.6199

JEAN-PAUL LAYRISSON
New Orleans Office

Belle Chasse Office:
8748 Highway 23
Belle Chasse, Louisiana 70037
504.392.3308

Ponchatoula Office:
125 E. Pine Street
Ponchatoula, Louisiana 70454
985.370.9832

June 12, 2008

Via U.S. Mail and Facsimile – 504.862.1209

Colonel Alvin B. Lee
U.S. Army District Commander
United States Corps of Engineers
P. O. Box 60267
New Orleans, LA 70160

RE: Idlewild Property [Westbank M]

Dear Col. Lee:

Thank you for your letter of June 10, 2008. My clients, White Oak Realty, LLC and Citrus Realty, LLC, have asked me to write to you regarding the property known as Idlewild in Plaquemines Parish, Louisiana. While we acknowledge that the Corps does not agree to our cease and desist request we made on May 3, 2008. We want to advise you of the

following facts and changes and ask that the Corps to reconsider that decision going forward and accept our amended cease and desist request.

Since our original cease and desist request, we have spent considerable, time, effort, and resources in contracting and taking soil borings for pending analysis via experts we have retained. We have retained subcontractors who are forming archeological evaluations. We have engaged subcontractors to complete the Phase I assessment. We are in the process of wetlands determination. All of this, of course, is consistent with our intent to make as much dirt available as possible for contractors supply or supply contract. My clients have no interest whatsoever in having their property taken and there is no reason to do so since my clients are willing to make their dirt available for use as quickly as possible for levee protection purposes. There is no need to take the drastic step of commandeering this property when, in fact, it will be made available on a voluntary basis under contractors supply or supply contract if the analysis results meet with the Corps specifications. This is especially important to us given the development goals we have with the property and the historic home my clients have on the property as well. My clients need to control their property for a lot of reasons. This is not unoccupied raw land. At the same time, my clients do what it takes to make as much dirt as possible available as quickly as possible to help with your endeavors to improve the levees by providing contractor supply borrow.

Additionally, White Oak Realty, LLC and Citrus Realty, LLC, the owners of the property, did

not grant right of ways to the Corps or any subcontractors of the Corps to evaluate the property for government-furnished borrow. White Oak Realty, LLC and Citrus Realty, LLC will not issue any such right of ways and have not granted any power of attorney to any other person or entity to do so. No other party is authorized to do so. Given this information, we respectfully ask that the Corps cease and desist any and all activity on my clients' referenced property related to government-furnish borrow.

If you have any questions or would like to meet with us or our experts regarding the property or plans, or obtain verification of our attempts to have the dirt certified as contractors supply as quickly as possible and available for use, please do not hesitate to contact me. I will to meet with you to do all that I can help reach mutual goals, making dirt available for levee use in a way that respects my clients' property rights and the Corps need for proper borrow. Thank you.

Very truly yours,

/s/

Jean-Paul Layrisson

JPL:nt

X:\DOCX\2925.19 IDLEWILD CLAY\2008 LETTERS\LEE (IDLEWILD) 6-12-08.DOC

DEPARTMENT OF THE ARMY
NEW ORLEANS DISTRICT,
CORPS OF ENGINEERS
P.O. BOX 60267
NEW ORLEANS, LOUISIANA 70160-0267

JUL 9 2008

REPLY TO
ATTENTION OF

Planning, Programs and
Project Management Division
Protection and Restoration Office

Mr. Jean-Paul Layrisson
Scandurro & Layrisson, L.L.C.
607 St. Charles Avenue
New Orleans, Louisiana 70130

Dear Mr. Layrisson:

The U.S. Army Corps of Engineers (Corps) notified you in a letter dated June 10, 2008, that the Corps was unable to agree to your request to cease and desist any and all activity pertaining to the acquisition of government-furnished borrow on the Idlewild property. This letter is in response to your June 12, 2008 request for the Corps to reconsider that decision due to efforts by the landowner to provide borrow under the contractor furnished or supply contract methods. The information provided in your letter has been reviewed. For the following reasons, the Corps cannot agree to your request.

As mentioned in past correspondence, an unprecedented amount of levee material is needed to construct the Greater New Orleans Hurricane and

Storm Damage Risk Reduction System (HSDRRS) Project. Therefore, the New Orleans District Corps of Engineers (CEMVN) is working with the State to pursue three avenues of borrow acquisition: government-furnished, contractor-furnished and supply contract. While recognizing the rights of White Oak Realty, LLC and Citrus Realty, LLC to pursue status as contractor-furnished providers, the Corps and its non-Federal sponsor, the State of Louisiana, will continue with our borrow acquisition schedule, obtaining borrow material using all three of the above-referenced methods, including government-furnished borrow sites. The exigency of the circumstances and the need for borrow material to protect the Greater New Orleans area necessitate this comprehensive course of action.

Having the task to oversee the HSDRRS and as faithful stewards of the federal tax-payers' dollars allocated to this project, it is incumbent upon CEMVN to pursue all reasonable sources of borrow material in the best manner for the entire system. The Corps is currently investigating the subject site to determine if suitable borrow is present under the existing right-of-entry provided by the West Jefferson Levee District on September 24, 2007, for subject site (see enclosed right-of-entry). Only after a determination is made for same, will White Oak Realty, LLC and Citrus Realty, LLC be notified of the government's intentions regarding acquisition. It is important to note that until such time, White Oak Realty, LLC and Citrus Realty, LLC are free to utilize their property in any manner they choose.

If we can be of further assistance, please do not hesitate to contact Mr. Thomas A. Holden, Jr.,

Deputy District Engineer for Project Management at (504) 862-2204 or myself at (504) 862-2077.

Sincerely,

/s/

Alvin B. Lee
Colonel, US Army
District Commander

Enclosures

WEST JEFFERSON LEVEE DISTRICT
7001 RIVER ROAD • MARRERO, LA 70072
TEL: (504) 340-0318 • FAX: (504) 340-7801

September 24, 2007

Ms. Linda C. LaBure, Chief
Real Estate Division
U.S. Army Corps of Engineers
P.O. Box 60267
New Orleans, Louisiana 70160-0267

Dear Ms. LaBure:

The purpose of this letter is to grant right of entry for the investigation of proposed borrow sites required for construction of the West Bank and Vicinity Hurricane Protection Project. We understand the investigation may include surveys, soil borings, and cultural resource and hazardous, toxic and radiological waste (HTRW) investigations. The limits of the proposed work are identified as sites J, K, L, and M as shown on your map, a copy of which is attached to this letter.

The survey work will include topographic and cross section surveys. The equipment to be used to conduct the surveys will include two-or four-wheel drive vehicles, standard surveying equipment, and small boats and trailers.

The soil borings, both disturbed and undisturbed, will be performed throughout the limits of work. The exact number and location of these borings will be determined by design engineers as needed at a later date using standard equipment such as a truck-mounted rig, hand augers, two-and four-wheel drive vehicles. The boring holes will be backfilled in accordance with standard criteria.

Environmental investigations will be conducted by teams of one to six persons who will visit selected sites to determine the quality and quantity of various habitat types. The work will be done entirely through visual inspection by environmental resource personnel. The cultural resource investigations will be conducted by a two-to-four person team. The team will examine the subject area for any items of cultural significance. Some subsurface investigations may be required to determine if any buried cultural remains exist within the project site limits. The subsurface investigations will be accomplished by hand augers and shovels, and all holes will be backfilled upon completion of the subsurface investigations. Artifacts discovered during the survey will be marked for identification, and, with the landowner's permission, removed for analysis to determine historical significance.

If items of seeming cultural significance are discovered during the initial traverse of the site, the investigations will be expanded to include an additional series of holes 3 to 6 feet square, excavated up to a depth of 6 feet. All excavations will be held to the absolute minimum required to determine the existence or nonexistence of significant cultural remains. All excavations will be backfilled upon completion of the investigations.

Objects discovered during the investigations may have to be removed from the site for analysis to determine their historic significance. Objects typically discovered in these types of investigations include pieces of ceramic, glass, bottles, leather, bricks and foundation fragments; lithic artifacts and debris; rusted metal objects and tools; and; flora and

fauna remains. All objects removed from the site will be returned to the landowner, if required, upon completion of the analysis and report. If the landowner does not require the return of the objects discovered, they will be donated to the State Historic Preservation Officer for permanent curation.

If the investigations reveal the existence of cultural remains significant enough to render a site eligible for the National Register, additional rights of entry for more extensive excavation and mitigation will be required.

The HTRW investigations will be performed by a two-to six-person team that will physically traverse the project area to determine whether any HTRW exists within the limits of the proposed work. If the existence of HTRW is suspected, soil and/or water samples may be taken.

Clearing and use of the land will be held to the minimum required for completion of all of the aforementioned work. Except for the loss of vegetation necessitated by light clearing, the area will be left in a condition comparable to that prior to the work. Standard practices regarding the protection of the environment will be followed. No roads, fences, buildings, or other improvements will be disturbed.

Access to perform all of the work will be via public road.

I, Gerald A. Spohrer Executive Director of the West Jefferson Levee District, which is serving as Executive Agent for the Louisiana Department of Transportation and Development, do hereby certify that the West Jefferson Levee District has provided the owners of the subject sites with legal notification

of an intent to perform these investigations pursuant to Act 182 of the Louisiana Legislature, Regular Session 1992, R.S. 38: 301 (D). The investigations may include surveys, soil borings, find cultural resource and hazardous, toxic and radiological waste (HTRW) investigations for the West Bank and Vicinity, Hurricane Protection Project, Borrow Investigation, Jefferson Parish, Louisiana and hereby grants right of entry to perform this work.

Witness my signature as Executive Director of the West Jefferson Levee District this 24 day of September, 2007

By: /s/
Gerald A. Spohrer
Executive Director
West Jefferson Levee District

Copies Furnished:

Mr. Edmond J. Preau, Jr. w/enclosure
Assistant Secretary
Public Works, Hurricane Protection and Intermodal Transportation
Louisiana Department of Transportation and Development
P.O. Box 94245
Baton Rouge, Louisiana 70804-9245

Mr. Ennis Johnson w/ enclosure
District Design, Water Resources and Development
Louisiana Department of Transportation and Development
7252 Lakeshore Drive
New Orleans, Louisiana 70124

Commissioners

ATTORNEY'S CERTIFICATE OF AUTHORITY

I, Owen J. Bordelon, attorney for the West Jefferson Levee District, certify that the West Jefferson Levee District has authority to grant the above Authorization for Entry by and for itself and as the executive agent for the Louisiana Department of Transportation and Development; said authorization for Entry is executed by the proper duly authorized officer; and that the Authorization for Entry is in sufficient form to grant the authorization therein stated.

WITNESS my signature as attorney for the West Jefferson Levee District, this 24th day of September, 2007.

By: /s/
Owen J. Bordelon
Attorney for the West Jefferson Levee District

WEST JEFFERSON LEVEE DISTRICT
7001 RIVER ROAD • MARRERO, LA 70072
TEL: (504) 340-0318 • FAX: (504) 340-7801

September 5, 2007

Mr. Thomas Carrere, et al
3900 N. Causeway Blvd., Suite 822
Metairie, LA 70002

Dear Mr. Carrere:

The West Jefferson Levee District, in connection with its responsibility as Executive Agent for the Non-Federal Sponsor, Louisiana Department of Transportation, is cooperating with the U.S. Army Corps. of Engineers for construction of the Westbank & Vicinity Hurricane Protection Project.

In support of this responsibility, the West Jefferson Levee District or its assigns will perform topographic and hydrographic surveys, soil borings, cultural resource investigations, environmental investigations, and perform a hazardous, toxic, and radiological waste (HTRW) assessment at several potential borrow sites.

Portions of your land identified as Site "M" on the enclosed map within the boundaries of the enclosed map.

We herein notify you that this activity is scheduled to begin at any time within a period of one (1) year from the date of this notice.

1. The topographic survey work will be performed using standard land surveying equipment and

tools, such as levels, GPS locaters, and tapes. The survey crew will access areas required for the survey work using two and four wheel vehicles. In order to achieve clear lines of sight while surveying, it may be necessary, in some areas to conduct some light clearing of small trees and shrubs. Following the surveys, the area will be left in a condition comparable to that prior to the work.

2. The exact location and number of soil borings needed for this study will be determined in the field. The equipment to be used to obtain the soil borings will include a truck mounted drill rig, hand augers, two and four wheel drive vehicles. All land based boring holes will be sealed following the sampling.

3. The cultural resource investigations will be conducted by a two to four person team. The team will physically traverse the entire project area to conduct a visual inspection of the study area. Subsurface investigations will be undertaken at random locations throughout the project area to determine the possible existence of buried items of cultural significance. The subsurface investigations will be accomplished by hand augers and/or shovels to depths of about 3 feet.

4. If items of seeming cultural significance are discovered during the initial traverse of the site, the investigations will be expanded to include an additional series of holes 3 or 6 feet square, excavated to depths of 6 feet. All excavations will be held to the absolute minimum required

to determine the existence or non-existence of significant cultural remains. All excavations will be backfilled upon completion of the investigations.

5. Objects discovered during the investigation may have to be removed from the site for analysis to determine their historic significance. Objects typically discovered in this type of investigation include pieces of ceramic, glass, bottles, leather, bricks and foundation fragments; lithic artifacts and debris; rusted metal objects and tools; and, flora and fauna remains. All objects removed from the site will be returned to the landowner, if required, upon completion of the analysis. and report. If the landowner does not require the return of the objects discovered, they will be donated to the State Historic Preservation Officer for permanent curation.

6. If the investigations reveal the existence of cultural remains significant enough to render a site eligible for the National Register, additional rights of entry for more extensive excavation and mitigation will be required. The cultural resource survey will be conducted by a two to four person team. The team will examine the subject area for any items of cultural significance. Some subsurface investigations maybe required to determine if any buried cultural remains exist within the project site limits. The subsurface investigations will be accomplished by hand augers and shovels and all holes will be backfilled upon completion of the subsurface investigation. Artifacts discovered during the survey will be marked for

identification and with the landowner's permission removed for analysis to determine historical significance.

7. Standard practices with regard to the protection of the environment will be followed, No roads, fences, buildings, or other improvements within the area will be disturbed. Except for the loss of vegetation necessitated by this work, the area will be left in a condition comparable to that prior to the work.

8. The environmental investigations will be conducted by a team of one to six persons who will visit the site to determine the quality and quantity of various habitat types. Environmental resource personnel will do this work entirely through visual inspection.

9. The HTRW investigations will be performed by a two to six person team that will physically traverse the project area to determine whether any hazardous or toxic waste exists within the limits of the proposed work. If the existence of HTRW is suspected, soil and/or water samples may be taken.

10. All tools, equipment, and other property taken upon or placed upon the land by the West Jefferson Levee District, its officers, agents, assigns or representatives, shall remain the property of the West Jefferson Levee District and shall be removed by the West Jefferson Levee District, its officers, agents, assigns or representatives.

11. The West Jefferson Levee District agrees to be responsible for damages, including death, arising from the activity of the West Jefferson Levee District, its officers, employees, or representatives on said land, in the exercise of rights under this right of entry, either by repairing such damage or at the option of the West Jefferson Levee District by making an appropriate settlement with the Owner in lieu thereof, and West Jefferson Levee District will hold Owner harmless from any liability, responsibility or expense of any nature or kind with respect thereto, and in the event of any law suit, will defend Owner at no cost to Owner.

12. Five (5) days after your receipt of this letter/notice for resident owner and fifteen (15) days for non-resident owner, the West Jefferson Levee District shall obtain the right to enter upon the subject property and conduct the proposed activities pursuant to Louisiana State Legislative Act 182. (copy attached hereto)

We thank you in advance for your cooperation and assistance in this important project and if you have any questions, please contact me at your convenience.

Sincerely,

/s/

Gerald A. Spohrer
Executive Director

Attachment

. . . . . .

Existing Conditions

Bottomland hardwood forest (BLH) is a habitat that is found throughout southeastern Louisiana and southwestern Mississippi. The typically productive forests are found in low-lying areas, and are usually dominated by deciduous trees such as hackberry, Chinese tallow tree, pecan, American elm, live oak, water oak, green ash, bald cypress, black willow, box elder, and red maple. Typical understory plants include dewberry, elderberry, ragweed, Virginia creeper, and poison ivy. Hard mast (nuts) and soft mast (samaras, berries) provide a valuable nutritional food source for birds, mammals, and other wildlife species.

The USAGE has regulatory authority over jurisdictional Waters of the United States, including wetlands, pursuant to Section 404 of the Clean Water Act (CWA), as discussed in section 3.2.1. Non-jurisdictional BLH are those habitats that do not meet all three wetland criteria (hydrophytic vegetation, hydric roils, end wetland hydrology), and thus are out of the USACE's jurisdiction (USACE, 1987). Section 906(b) of WRDA 1986 requires mitigation for impacts to BLH caused by an USACE project.

Staff from the CEMVN and the USFWS visited the proposed contractor-furnished borrow areas to assess the value of these BLH habitats. Table 2 lists these values, as calculated by using a habitat evaluation model.

- Acosta 2

  The proposed Acosta 2 site is forested with 1.1 acres of BLH habitat. Species found at the site

include tallow, live oak, and locust. Some of this habitat along the drainage canal has been recently been cleared by the landowner.

- Idlewild Stage 2

  The proposed Idlewild 2 site is mostly forested with BLH habitat. Forested wetlands (i.e., swamp habitat) and cleared areas are also found on the site.

- King Mine

  BLH habitat was not found at the King Mine site. The site is forested with pine-dominated habitat, which is not classified as BLH.

- Levis

  The proposed Levis site is mostly mixed wetland habitat. The anticipated clearing of the land is associated with construction of the planned mixed-use development and not the proposed contractor-furnished borrow area the CEMVN. Compensatory mitigation for impacts to wetlands was completed via the CEMVN Section 404 regulatory program.

- Lilly Bayou

  The proposed Lilly Bayou site is mostly forested with BLH habitat. Species found at the site include sweetgum, tallow, elm, box elder, hickory, sugarberry, hornbeam, water oak, Hercules' Club, dogwood, cottonwood, beech, and sycamore.

- Port Bienville

  The Port Bienville site was previously planted in pine for commercial harvesting, and is

currently a mixture of overgrown pine habitat, cleared areas, BLH habitat, and active borrowed area (Frierson). Species found within the site's BLH habitat include sweetgum, tallow, wax myrtle, magnolia, red maple, various oaks, and scattered pine.

- Raceland Raw Sugars

  There are approximately 1.71 acres of BLH forest within the 104-acre parcel of the proposed Raceland Raw Sugars site. Species found in this area include tallow, sugarberry, wax myrtle, black willow, and dogwood. Most of the site is used for sugarcane farming.

- River Birch Landfill Expansion

  The proposed River Birch Landfill Expansion is one of a number of tracts of land owned by River Birch Incorporated and Hwy. 90, LLC that will eventually be used as a landfill. The site was dominated by wetlands prior to being cleared for landfill development, and is currently being used as a borrow pit for non-CEMVN work. Compensatory mitigation for impacts to wetlands was completed via the CEMVN Section 404 regulatory program. No BLH is currently found at the site.

- Scarsdale

  The proposed Scarsdale site is forested with BLH habitat. Species found at the site include red maple, live oak, water oak, elm, box elder, dogwood, tallow, wax myrtle, and mulberry.

- Spoil Area

  The proposed Spoil Area site is mostly forested with BLH habitat. Species found at the site include tallow, mulberry, wax. myrtle, live oak, chinaberry, box elder, and red maple.

No Action

- All Sites

  Direct Impacts

  Under the no action alternative, direct impacts to non-jurisdictional BLH would not occur at the proposed Acosta 2, Idlewild Stage 2, King Mine, Levis, Lilly Bayou, Port Bienville, Raceland Raw Sugars, River Birch Landfill Expansion, Scarsdale, and Spoil Area contractor-furnished borrow areas due to the proposed action. The proposed sites would not be used as contractor-furnished borrow areas.

  Recent clearing at the proposed Acosta 2 site removed some BLH habitat along the drainage canal separating the Acosta 1 and Acosta 2 sites. Mature trees seem to have been pushed down with bulldozers and excavators. Mobile fauna likely vacated the area during construction, most likely to similar habitat within the vicinity. All non-mobile fauna and flora is thought to be destroyed.

  BLH habitat at the proposed Levis site would be removed in accordance with the construction of the planned mixed-use development. Mature trees would be cut down with the use of chainsaws or pushed down

with bulldozers and excavators. Woody debris would be cleaned up and all berms would be leveled to eliminate hydrologic impacts. Mobile fauna would be expected to vacate the area during construction, most likely to similar habitat within the vicinity. All non-mobile fauna and flora would be destroyed.

Indirect Impacts

Under the no action alternative, no indirect impacts to non-jurisdictional BLH would occur at the proposed Acosta 2, Idlewild Stage 2, King Mine, Levis, Lilly Bayou, Port Bienville, Raceland Raw Sugars, River Birch Landfill Expansion, Scarsdale, and Spoil Area contractor-furnished borrow areas due to the proposed action. The proposed sites would not be used as contractor-furnished borrow areas.

Clearing at the proposed Acosta 2 site removed some BLH habitat along the drainage canal separating the Acosta 1 and Acosta 2 sites. This action was part of the contractor's work in preparing the site for a non-CEMVN borrow area. The landowner's recent clearing of a portion of the proposed Acosta 2 borrow area may indirectly affect nearby non-jurisdictional BLH on the site by changing the hydrology and nutrient dynamics in the vicinity. These changes have not been quantified. Additionally, use of the approved Acosta 1 contractor-furnished borrow area may result in indirect impacts to non-jurisdictional BLH. The excavation of borrow material and the excavated borrow area may affect nearby non-jurisdictional BLH by changing the hydrology

and nutrient dynamics in the vicinity. These changes have not been quantified.

BLH habitat at the proposed Levis site will be removed in accordance with the construction of the planned mixed-use development. Clearing of BLH habitat and construction of the development may indirectly affect nearby non-jurisdictional BLH on the site by changing the hydrology and nutrient dynamics in the vicinity. These changes have not been quantified.

Cumulative Impacts

Under the no action alternative, no cumulative impacts to non-jurisdictional BLH at the proposed Acosta 2, Idlewild Stage 2, King Mine, Levis, Lilly Bayou, Port Bienville, Raceland Raw Sugars, River Birch Landfill Expansion, Scarsdale, and Spoil Area contractor-furnished borrow areas would occur due to the proposed action. The proposed sites would not be used as contractor-furnished borrow areas. Under this alternative, the proposed HSDRRS projects would be built to authorized levels using potential government-furnished and/or contractor-furnished borrow areas described in IER#18, IER#19, IER#22, IER #23, IER #25, IER #26, IER #28, IER #29, IER #30, IER #32, or other sources yet to be identified. Sites in these IERs encompass more than 1,700 acres of BLH that may be impacted for use on HSDRRS work.

The landowner's recent clearing of portions of the Acosta 2 site, and the anticipated clearing of

the Levis site, contribute to the cumulative loss of non-jurisdictional BLH in the project area

Cumulative impacts to non-jurisdictional BLH would continue in the project area under the no action alternative. There are over 60 approved potential borrow areas in southeastern Louisiana and southwestern Mississippi that may be utilized for construction of the HSDRRS, some of which have BLH present.

Non-jurisdictional BLH habitat in the project area has historically been affected by residential, commercial, and industrial development. Land has been converted for residential, commercial, and industrial uses in a significant portion of leveed areas in the region. It is expected that this historical trend would continue to impact non-jurisdictional BLH habitat in the region.

Proposed Action

The CEMVN and USFWS have assessed the environmental impacts of the proposed action. The agencies have determined that the proposed action would have unavoidable impacts to a number of acres of non-jurisdictional BLH, which is quantified by Average Annualized Habitat Units (AAHUs) (table 2). Habitat Units (HU) represent a numerical combination of habitat quality (Habitat Suitability Index) and habitat quantity (acres) within a given area at a given point in time. AAHUs represent the average number of HUs within any given year over the project life for a given area

Use of the proposed King Mine, Levis, and River Birch Landfill Expansion contractor-furnished borrow areas would not cause impacts to non-jurisdictional BLH. BLH habitat is not found at the King Mine, Levis, and River Birch Landfill Expansion sites, and thus would not be impacted by the proposed action.

Use of the proposed Acosta 2, Idlewild Stage 2, Lilly Bayou, Port Bienville, Raceland Raw Sugars, Scarsdale, and Spoil Area contractor-furnished borrow areas would cause unavoidable impacts to 965.30 acres (572.20 AAHUs) of non-jurisdictional BLH on the site (table 2)

. . . . . .

. . . . .	. . . .	. . . .	. . . . .
Acosta 2	4	1.1	0.45
Idlewild Stage 2	108	83.3	56.49
King Mine	158	0	0
Levis	51	0	0
Lilly Bayou	437	356.1	242.72
Port Bienville	677	89.0	55.72
Raceland Raw Sugars	231	1.71	0.56
River Birch Landfill Expansion	196	0	0
Scarsdale	56	51.23	41.04
Spoil Area	435	382.8	175.19
. . . . .	. . . .	. . . . .	. . . . .

Compensatory mitigation is required to be completed prior to impacts. The landowners or contractors will accomplish compensatory mitigation through the purchase of mitigation bank credits at an appropriate mitigation bank within the watershed as the impacts. Mitigation for unavoidable impacts to non-jurisdictional BLH is discussed in section 7, and will be described under a separate IER.

- King Mine, Levis, and River Birch Landfill Expansion

  Direct Impacts

  No direct impacts to non-jurisdictional BLH would occur with use of the proposed King Mine, Levis, River Birch Landfill Expansion contractor-furnished borrow areas because the sites do not contain any non-jurisdictional BLH.

  Indirect Impacts

  Use of the proposed King Mine, Levis, and River Birch Landfill Expansion contractor-furnished borrow areas would not likely result in indirect impacts to non-jurisdictional BLH because the habitat type is not near these sites.

  Cumulative Impacts

  Use of the proposed King Mine, Levis, end River Birch Landfill Expansion contractor-furnished borrow areas would not contribute to the cumulative loss of non-jurisdictional BLH in the project area

because the sites do not contain any BLH habitat.

Cumulative impacts non-jurisdictional BLH would continue in the project area end would be similar to those described for the no action alternative.

- Acosta 2, Idlewild Sage 2, Levis, Lilly Bayou, Raceland Raw Sugars, Scarsdale, and Spoil Area

  Direct Impacts

  Excavation of the proposed Acosta 2, Idlewild Stage 2, Lilly Bayou, Port Bienville, Raceland Raw Sugars, Scarsdale, and Spoil Area contractor-furnished borrow areas would directly impact 965.30 acres of non-jurisdictional BLH (table 2).

  Mature trees would be cut down with the use of chainsaws or pushed down with bulldozers and excavators. Woody debris would be cleaned up and all berms would be leveled to eliminate hydrologic impacts. Mobile fauna would be expected to vacate the area during construction, most likely to similar habitat within the vicinity. All non-mobile fauna and flora would be destroyed.

  The landowner's recent clearing of portions of the proposed Acosta 2 site directly impacted non-jurisdictional BLH in the project area, as described in the no action. Further clearing at the site would also contribute to the direct impact to non-jurisdictional BLH in the project area.

Any additional direct impacts to non-jurisdictional BLH would depend on what the landowners decide to do with the sites following excavation.

The landowners of the proposed Acosta 2, Idlewild Stage 2, Lilly Bayou, Port Bienville, Raceland Raw Sugars, Scarsdale, and Spoil Area contractor-furnished borrow areas will complete mitigation for the loss of non-jurisdictional BLH if their proposed sites are used for construction of the HSDRRS. Proof of mitigation for non-jurisdictional BLH impacts would be supplied to the CEMVN prior to excavation. If these sites are used as contractor-furnished borrow areas and mitigation is completed by the landowner(s), the landowner's mitigation will be discussed in upcoming mitigation IERs and the CEO.

Indirect Impacts

Use of the proposed Acosta 2, Idlewild Stage 2, Lilly Bayou, Port Bienville, Raceland Raw Sugars, Scarsdale, and Spoil Area contractor-furnished borrow areas may result in indirect impacts to non-jurisdictional BLH. The excavation of borrow material and the excavated borrow areas may affect nearby non-jurisdictional BLH by changing the hydrology and nutrient dynamics in the vicinity. These changes have not been quantified.

The landowner's recent clearing of portions of the proposed Acosta 2 site directly

impacted non-jurisdictional BLH in the project area, as described for the no action alternative. Further clearing at the site would also contribute to the indirect impact to non-jurisdictional BLH in the project area.

Additional potential indirect impacts to non-jurisdictional BLH would depend on what the landowners decide to do with the sites following excavation.

Cumulative Impacts

Use of the proposed Acosta 2, Idlewild Stage 2, Lilly Bayou, Port Bienville, Raceland Raw Sugars, Scarsdale, and Spoil Area contractor-furnished borrow areas would contribute to the cumulative loss of non-jurisdictional BLH in the project area. Additional potential cumulative impacts to non-jurisdictional BLH would depend on what the landowners decide to do with the sites following excavation.

The recent clearing of portions of the proposed Acosta 2 contractor-furnished borrow area contributed to the cumulative loss of non-jurisdictional BLH in the project area. Additional potential cumulative impacts to non-jurisdictional BLH would depend on what the landowner decides to do with the site following excavation.

Cumulative impacts to non-jurisdictional BLH would continue in the project area

and would be similar to those described for the no action alternative.

. . . . . .

For the purposes of this IER, upland resources are any non-wetland areas. Non-jurisdictional BLH habitat, although part of this definition, are discussed separately in section 3.2.2. Impacts to farmland and farmland soils, which may be located in upland areas, are discussed in section 3.2.4. Upland areas include maintained and unmaintained pasture, overgrown/vacant areas, and forested areas that are neither wetland nor non-jurisdictional BLH. Following this definition, there are no upland resources at the proposed Acosta 2, Idlewild Stage 2, King Mine, Levis, Lilly Bayou, Port Bienville, Raceland Raw Sugars, River Birch Landfill Expansion, Scarsdale, and Spoil Area contractor-furnished borrow areas.

. . . . . .

Existing Conditions

The National Resources Conservation Service (NRCS) uses a land evaluation and site assessment system to establish a farmland and conversion impact rating score on proposed sites. This score is used by Federal agencies in assessing potential impacts to farmland and farmland soils in potential project areas. As identified by the NRCS, the proposed Acosta 2, Idlewild Stage 2, King Mine, Levis, Lilly Bayou, Port Bienville, Raceland Raw Sugars, River Birch Landfill Expansion, Scarsdale, and Spoil Area contractor-furnished borrow areas contain prime farmland soil.

Discussion of Impacts

No Action

- All Sites

Direct Impacts

Under the no action alternative, no direct impacts to farmland and farmland soils at the proposed Acosta 2, Idlewild Stage 2, King Mine, Levis, Lilly Bayou, Port

* * *

CEMVN Response 2: Concur. The CEMVN will provide to the USFWS proof of payment to mitigation banks by landowners.

Recommendation 3: Whenever applicable, the Service recommends that the [CEMVN] consult the [USFWS]-developed National Bald Eagle Management (NBEM) Guidelines, utilize the interactive webpage at: http://www.fws.gov/midwest/eagle/guidelines/index.html, and implement any recommendations suggested. We also ask that the [CEMVN] provide a copy of their disturbance determination to our office.

CEMVN Response 3: Concur

Recommendation 4: The protocol to identify and prioritize borrow sources provided in our August 7, 2006, Planning-Aid letter should be utilized as a guide for locating future borrow-sites and expanding existing sites.

CEMVN Response 4: Concur.

Recommendation 5: Because of the potential for hydrologic modifications caused by borrow material excavation at the Acosta 2, Lilly Bayou, King Mine, Port Bienville, Scarsdale, and Spoil Area sites to impact nearby, jurisdictional wetlands outside of the planned excavation areas, the [USFWS] recommends that the [CEMVN] conduct an investigation to determine the extent of these potential impacts. The [USFWS] also recommends that a buffer zone of at least 100 feet be designated between those borrow sites and any jurisdictional

wetlands in which no excavation would be allowed, unless the hydrologic investigation suggests the need for a greater buffer zone size.

CEMVN Response 5: A buffer zone of at least 100 feet has been designated between the excavation areas on the borrow sites and any jurisdictional wetlands in which no excavation would be allowed. The CEMVN will consider investigation into the potential for hydrologic modifications caused by borrow material excavation.

Recommendation 4: Any proposed change in borrow site features, locations or plans shall be coordinated in advance with [the USFWS], [the National Marine Fisheries Service], LAWLF, and LADNR.

CEMVN Response 4: The CEMVN will coordinate with these agencies.

Recommendation 5: If a proposed borrow site is changed significantly or excavation is not implemented within one year, we recommend that [the CEMVN] notify the contractor to reinitiate coordination with… this office to ensure that the proposed project would not adversely affect any federally listed threatened or endangered species or their habitat.

CEMVN Response 5: Concur.

7. MITIGATION

Mitigation for unavoidable impacts to the human and natural environment described in this and other IERs will be addressed in separate mitigation IERs.

The CEMVN has partnered with Federal and state resource agencies to form an interagency mitigation team that is working to assess and verify these impacts, and to look for potential mitigation sites in the appropriate hydrologic basin. This effort is occurring concurrently with the IER planning process in an effort to complete mitigation work and construct mitigation projects expeditiously. As with the planning process of all other IERs, the public will have the opportunity to give input about the proposed work. These mitigation IERs will, as described in section 1 of this IER, be available for a 30-day public review and comment period.

All potential contractor-furnished borrow areas described in this IER were assessed by the USFWS and the CEMVN under NEPA, the Fish and Wildlife Coordination Act, and under Section 906(b) WRDA 1986 requirements. It has been determined that use of the proposed contractor-furnished borrow areas would not directly impact jurisdictional wetlands, and therefore no mitigation for this resource is necessary. Approximately 965.3 acres (572.2 AAHUs) of non-jurisdictional BLH would be impacted with use of the proposed Acosta 2, Idlewild Stage 2, King Mine, Lilly Bayou, Raceland Raw Sugars, River Birch Landfill Expansion, Scarsdale, and Spoil Area contractor-furnished borrow areas, and would be mitigated for by the landowners if the proposed sites are selected by construction contractors for use in building the HSDRRS.

Table 8 shows the cumulative impacts of all IERs which have been completed as of the date of publication. Further information on mitigation efforts will be available in forthcoming IERs.

Contractor-Furnished Borrow Mitigation Policy - Issues and Solutions

BACKGROUND

Compensatory mitigation for impacts to **non-wetland bottomland hardwood (BLH)** habitat is required for USACE Civil Works projects, as per Section 906 of WRDA '86. This requirement extends to BLH impacts within **contractor-furnished borrow areas for the HSDRRS.** Landowners of potential borrow areas are informed of the requirement during the borrow-approval process. As detailed in our borrow-contractor contracts, the CEMVN requires proof of mitigation be furnished **prior to the site's use for a CEMVN project.** The requirement that mitigation occur before or concurrent with the impact/construction can be found in WRDA '86, 33 USC Sec. 2283(a). The same requirement is applicable to compensatory mitigation within the Regulatory program. See 33 CFR 332.3(m). Civil Works mitigation plans should be consistent with mitigation standards of the Regulatory program. See WRDA '07, 33 USC 2283(d).

The CEMVN expects to award many HSDRRS contracts in the coming months that require construction contractors to obtain borrow material from contractor-furnished borrow areas (those borrow areas approved in Individual Environmental Reports #19, #23, #26, #29, #30, and #32). Currently, **5 of 33 sites that were approved in IERs require compensatory mitigation.** To date, none of the five sites has been used for a CEMVN construction project.

Site	**Parish**	**IER**	**BLH Acres**	**BLH AAHUs**
Eastover Phase 2	Orleans	29	31.10	6.50
Willow Bend Phase 2	St. John the Baptist	29	76.20	42.10
Contreras Dirt (Cells E, F, & Z)	St. Bernard	30	225.00	189.40
Nairn	Plaquemines	32	20.50	11.6
3C Riverside Phase 3*	St. Charles	32	174.60	84.60

* Not final. The CEMVN Environmental Branch and USFWS are revisiting these values.

Habitat value is represented by Average Annualized Habitat Units (AAHUs). The CEMVN Environmental Branch and USFWS calculated these values by using field data and a habitat model (WVA). Typically, a landowner would use the AAHU value when talking with a mitigation bank.

Mitigation will be achieved by the purchase of credits from a mitigation bank by either the borrow area landowner or construction contractor. Mitigation credits must be purchased and proof of purchase provided **prior to the site's use for a CEMVN project.**

A policy is needed to address how mitigation should be handled for contractor-furnished borrow areas potentially used for CEMVN projects.

ISSUES

USACE must mitigate for all BLH impacts associated with the HSDRRS projects. Within the contractor-furnished borrow program, USACE requires the contractors/landowners to fulfill that mitigation requirement. Nevertheless, USACE is not relieved of its legal responsibility. Accordingly, any BLH impacts that occur but are not mitigated by the contractors/landowners must be mitigated by USACE.

How do we best ensure that USACE fulfills its legal responsibility to mitigate for impacts to BLH with respect to contractor-furnished borrow?

OC and Environmental Branch recommend that the landowners be required to mitigate for all BLH impacts within the approved perimeters of the borrow site - even if the contractor represents that it will not be excavating the entire site. This proposed policy is the **best and safest course to ensure that the required mitigation is accomplished.** Although there is the chance that a landowner may sell some but not all of his available borrow and that he will need to mitigate for all BLH within his approved site perimeters, the landowner is able to make his own business judgment as to whether the price he charges for his initial borrow sale will be sufficient to compensate him and cover the price of mitigation.

This approach guarantees that the appropriate and required compensatory mitigation is achieved. It ensures that once we give the okay to a contractor to excavate a site, we know that whatever the contractor or landowner may do on the site

thereafter, the legal requirement of mitigation is satisfied. Several points to consider:

1. The drawings submitted by the contractor may not accurately reflect the BLH that will be cleared or even the exact outline of the area that will be excavated within the larger approved area. Do we require that the drawing be prepared by a professional surveyor and include a legal description of the excavation area? Do we require that a professional surveyor flag the perimeters of the area outlined in the drawing that will be excavated? How do we ensure that the contractor will clear and excavate only within the outline depicted in the drawing? Does the contractor sign an agreement to that effect? Does that contract provide for penalties if it is violated?

2. Regardless of the drawing that is submitted, once the contractor enters the site, we have no control over what BLH is actually cleared. For a variety of reasons - negligence, inadvertence, staging or access needs to name a few - the contractor may clear more BLH than is necessary for the planned excavation. Are we sufficiently resourced to make a site visit in every case to determine exactly what was cleared?

3. What happens if we determine after excavation that more BLH was cleared than was mitigated? How do we enforce the required mitigation? We don't have 404 enforcement jurisdiction. Does the CEMVN then assume the expense and burden of performing the required mitigation?

4. Even assuming that by force of suggestion or contract, we might be able to obtain after-the-impact mitigation (also a problem - under the regulations

the mitigation is to occur prior to or concurrent with the impact), who would be responsible - the landowner who believes he already performed all required mitigation or the contractor who made the decision to clear more BLH (and maybe didn't inform the owner)? If we intend to rely on contractual provisions, do we believe that DOJ/US Attorney will be interested in taking misfeasors to court for enforcement?

Notably, there is a significant difference between a contractor-furnished borrow site and one of our construction projects. USACE quality assurance procedures provide that USACE inspectors and engineers monitor construction projects throughout the construction period. When deficiencies are noted, the inspector works with the contractor to correct those deficiencies promptly. This is important because it means that USACE personnel are on-site and can learn of mistakes, problems or exceedences of rights of way and are able to address those issues promptly. In the case of contractor-furnished borrow, we are not on-site. Short of providing on-site monitoring/final inspections there is no way for us to know what the contractor is doing/has done and no way for us to take appropriate corrective measures, even to the extent that such measures are available.

POTENTIAL MITIGATION POLICY OPTIONS

1. **Require Mitigation for Impacts to BLH on Entirety of Approved Borrow Area**

   Pros:

   - Ensures full USACE compliance with WRDA 86

- Easy to track, administer
- Reduced project cost b/c no QA inspection, monitoring

Cons:

- Landowners will have to mitigate for areas that may not be used
- May increase project costs

Option 1.a: Create procedure whereby landowner has option to return credits to mitigation bank for refund for areas not used

Pros:

- Landowner will not bear costs for mitigation for impacts that may not occur

Cons:

- Still will need QA inspections to determine actual impacts

2. **Allow landowner to submit reduced footprint for CEMVN and resource agency review/approval; if wanted to use site again, would have to re-submit remainder for approval.**

Pros:

- Ensures full compliance with WRDA '86
- Appeases landowners of pits with mitigation requirements

Cons:

- Time to write MFR, other documents

- Time for Environmental Branch and USFWS to recalculate mitigation
- Would require follow-up inspection(s) by CEMVN and USFWS staff
- May increase project costs due to increase USACE staffing requirements

3. Accept contractor plan to use only a portion of the site

Pros:

- Appeases landowners of pits with mitigation requirements

Cons:

- Risk of noncompliance with WRDA '86
- Time to write MFR, other documents
- Time for Environmental Branch and USFWS to recalculate mitigation
- Would require follow-up inspection(s) by CEMVN and USFWS staff
- May increase project costs due to increased CEMVN staffing requirements
- May increase project costs if USACE must pay for mitigation not performed by landowner/contractor

4. Hold entire cost of mitigation in escrow account to pay mitigation bank once impacts are finally determined.

Pros:

- Ensures full compliance with WRDA '86

Cons:

- Landowners must put up funds sufficient to satisfy entire mitigation requirement, although some funds may be returned
- May increase project costs if a site with required mitigation is used by a contractor
- Requires QA inspections and increased Environmental Branch staffing costs for tracking, recalculations
- Does not meet requirement that mitigation occur before or concurrently with impacts