UNITED STATES DISTRICT COURT
SOUTERN DISTRICT OF FLORIDA
Ft. Pierce Division

CIVIL Case No. 9:19 cv 81086
District Court Judge Middlebrooks
Magistrate Judge Brannon

UNITED STATES SUGAR CORPORATION,

Plaintiff,

-v-

LIEUTENANT GENERAL TODD T. SEMONITE, in his official capacity as Commanding General and Chief of Engineers for the United States Army Corps of Engineers; COLONEL ANDREW KELLY, in his official capacity as Commanding District Engineer for the United States Army Corps of Engineers, Jacksonville District; and UNITED STATES ARMY CORPS OF ENGINEERS,

Defendants.

DEFENDANTS' MOTION TO DISMISS
AND MEMORANDUM OF LAW IN SUPPORT

MOTION TO DISMISS

Lieutenant General Todd T. Semonite, in his official capacity as Commanding General and Chief of Engineers for the United States Army Corps of Engineers; Colonel Andrew Kelly, in his official capacity as Commanding District Engineer for the United States Army Corps of Engineers, Jacksonville District; and United States Army Corps Of Engineers, Defendants, hereby move to dismiss Plaintiff's Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction, on the grounds that Plaintiff lacks standing and the controversy alleged is moot.

This motion is supported by the memorandum of law, and exhibits, that follow.

Respectfully submitted this 21st day of October, 2019.

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Deputy Assistant Attorney General
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MEMORANDUM OF LAW
IN SUPPORT OF DEFENANTS' MOTION TO DISMISS

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I. INTRODUCTION

Plaintiff claims that actions taken by the United States Army Corps of Engineers (Corps) last Winter and Spring violated the National Environmental Policy Act (NEPA). But any such claims are moot, because the actions complained of are complete; moreover, Plaintiff lacks standing to assert its claims, because it alleges no concrete, redressable injury and because its interests are not those NEPA is designed to promote.

II. STATEMENT OF FACTS

Plaintiff's Complaint challenges the Corps' decision to make certain low-volume releases from Lake Okeechobee in late October, 2018, through May, 2019. The Corps' management system for Lake Okeechobee is complex and has a long history. Assessing the viability of Plaintiff's Complaint requires at least a brief review of that history.

A. Central and Southern Florida Project

The South Florida aquatic ecosystem is controlled in part by the federally constructed Central and Southern Florida Project (C&SF Project), which extends from south of Orlando to the Florida Keys and is composed of a regional network of canals, levees, storage areas and water control structures. Section 203 of the Flood Control Act of 1948 (P.L. 80-858) created the C&SF Project, as described in House Document 643, 80th Congress, Second Session, for Flood Control and Other Purposes. Project purposes for the C&SF Project are navigation, flood control, water supply, drainage and water control, recreation, water supply to Everglades National Park, preservation of fish and wildlife, prevention of saltwater intrusion, and groundwater recharge.

Section 203 of the Flood Control Act of 1954 (P.L. 83-780) authorized the remainder of the Comprehensive Plan for the C&SF Project. This included flood control, water conservation, navigation, and other features. The Flood Control Act of 1954 recognized that the plan of improvement may require refinement and that modifications within the scope and purpose of the authorization could be made at the discretion of the Chief of Engineers. In addition, Section 309(l) of the Water Resources Development Act of 1992 (P.L. 102-580, October 31, 1992, 106 Stat 4794) grants the Chief of Engineers authority for general review of the C&SF project. Today, the C&SF Project includes more than 1,000 miles each of canals and levees, 150 water control structures, and 16 major pump stations.

B. The Lake.

Lake Okeechobee, the second largest freshwater lake in the contiguous United States, is part of the C&SF Project and is at the center of South Florida's ecosystem, water supply and flood control system. Lake Okeechobee Regulation Schedule Study, Final Supplemental Environmental Impact Statement (LORS SEIS) (excerpts attached as Exh. A) at 1.[1] Lake Okeechobee is a critical component in supplying consumptive demands, including urban drinking water, irrigation for agricultural lands, recharge for wellfields, and support for a recreational sport fishery, commercial fishery, wading bird breeding and foraging, resident and migratory waterfowl, and other aquatic biota. Flows from Lake Okeechobee supply, and influence the ecology of, the St. Lucie estuary to the east and the Caloosahatchee River estuary to the west. Exh. A at 1.

Lake Okeechobee has an area of approximately 730 square miles and occupies portions of Glades, Hendry, Martin, Okeechobee, and Palm Beach counties. It is surrounded by the Herbert Hoover Dike; the dike, and several water control structures, allow the Corps to manage the lake. The Corps, carrying out its congressional directives, manages the lake to meet different purposes, including flood control and water supply, as well as environmental enhancement. Lake Okeechobee benefits south Florida by storing water during wet periods for subsequent environmental, urban and agricultural needs during dry periods.

C. LORS.

The Corps' current overall plan for water management in Lake Okeechobee is the 2008 Lake Okeechobee Interim Regulation Schedule (LORS) contained in the Water Control Plan for Lake Okeechobee and Everglades Agricultural Area, dated March, 2008. LORS[2] was prepared in accordance with engineering regulations, and is supported by the LORS SEIS dated November 2007. The Record of Decision for the Lake Okeechobee Regulation Schedule was signed by the Corps' South Atlantic Division Commander on April 28, 2008.

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[1] The documents (other than statutes and regulations, and one declaration) referenced in this factual recitation include only those materials relied upon, and in most cases attached to, the Complaint. In Section III (B) below, we discuss the authorities that establish the propriety of the Court's relying upon such documents in deciding Defendants' Motion to Dismiss.

[2] The term "LORS" is commonly used to refer not only to the regulation schedule, but also to the entire Water Control Plan, which was attached to the Complaint as ECF 1-4 at 22-73.

The Corps' water management operations for Lake Okeechobee considers all Congressionally-authorized project purposes for Lake Okeechobee, the Okeechobee Waterway, and the Everglades Agricultural Area. LORS at 7-1 (ECF 1-4 at 22).[3] LORS was "not developed to optimize performance of any single project purpose, but rather attempts to balance the performance of the multiple project purposes." LORS at 7-29 (ECF 1-4 at 50). As explained in LORS, "[t]he decision-making process to determine quantity, timing, and duration of the potential release from Lake Okeechobee includes consideration of …: C&SF Project conditions, historical lake levels, estuary conditions/needs, lake ecology conditions/needs, WCA [Water Conservation Area] water levels[4], [Stormwater Treatment Area] available capacity, current climate conditions, climate forecasts, hydrologic outlooks, projected lake level rise/recession, and water supply conditions/needs." LORS at 7-8, 7-9 (ECF 1-4 at 29-30).

D. Additional Operational Flexibility (AOF)

All of the alternatives analyzed in the LORS SEIS "were designed to increase operational flexibility. Considering the potential benefits from recent lake inflow forecasting tools, and the rapid increase in state-of-the-art forecasting technology, it is practical to establish more flexible rules which allow lake managers to utilize supplemental information and apply their best professional judgment in making operational decisions." Exh. A at 22. Thus from the outset, LORS was designed with the understanding that its guidelines would not – indeed, could not – be rigid.

The 2008 LORS Water Control Plan accordingly set out what is known as "additional operational flexibility [AOF]." *See, e.g.*, LORS at 7-29 to 7-31 (ECF 1-4 at 50-52). "Additional operational flexibility provides water managers the ability to consider releases from Lake Okeechobee to the Water Conservation Areas and to tide (estuaries) to minimize damages or to meet project purposes when the 2008 LORS Parts A through D (Figures 7-1 through 7-4) are not effective at managing lake levels. Each event to be addressed by additional operational flexibility is unique and releases to be implemented will be defined by a desired outcome or time-period." LORS at p. 7-10 (ECF 1-4 at 31). During LORS plan formulation, varying lake regulation

[3] The Flood Control Act of 1954 recognized that the plan of improvement may require refinement and that modifications within the scope and purpose of the authorization could be made at the discretion of the Chief of Engineers. *See* Oct. 26, 2018 Mem. for the R. (2018 MFR) --at 2, ECF No. 1-4 at 3.

[4] A map showing the relevant Water Conservation Areas can be found in ECF 1-3.

schedules were simulated using a Period of Record Model, which studied the 35-year time period from 1965 to 2000. *Id*.; *see also* 2018 MFR at 5 (ECF 1-4 at 2-16). It was anticipated that future events similar to those experienced under the Period of Record would be effectively managed by 2008 LORS. LORS at p. 7-29 (ECF 1-4 at 50). It was also recognized that occasionally AOF would be used to address circumstances that were not collectively evaluated for the Period of Record. *Id*.

For example, releases may be made to prevent undesirably high lake levels or to lower lake levels in order to reduce the risk to the Herbert Hoover Dike and to prevent adverse environmental impacts in the lake. LORS at p. 7-30 (ECF 1-4 at 51). The water control plan also explains that low volume releases may be implemented as part of AOF "in an effort to benefit water quality within the lake and/or downstream" (*see* LORS at 7-20) (ECF 1-4 at 41), "to prevent high lake levels and possible future high discharges to the estuaries" (*id.* at 7-21 (ECF 2-4 at 42)), "in an effort to reduce high turbidity levels within the lake" (*id.*), or "in an effort to benefit fish and wildlife within the lake and downstream." *Id*.

AOF was specifically evaluated in the LORS SEIS. *See* Exh. A at 84-86. In evaluating the environmental effects of AOF, the LORS SEIS states:

> Release decisions will take into account the estuaries' biologically-derived maximum flow, future water supply demands, C&SF Project system-wide conditions, and lake ecological conditions, as appropriate. Consideration of the concern for public health and safety is the USACE's highest priority. When conditions exist for such releases, experts on estuarine, lake, and wetland ecology would provide scientific input with regard to the effects these release would have on the environment. … The additional operational flexibility will be considered to obtain additional benefits, and to provide the opportunity to minimize impacts in the longer term.

Id. at p. 84.

Relevant to the late-2018 and early 2019 releases challenged in Plaintiff's Complaint, the LORS SEIS noted that "past experience shows that low volume releases carried out in a pro-active manner can reduce the later need for more potentially damaging high volume releases to the estuaries, and also reduce littoral zone impacts due to rapidly rising stages. The [AOF] is expected to provide benefits to a variety of fish, wildlife, and aquatic plants, both in the lake and in downstream ecosystems." *Id*. The SEIS also identified scenarios that would trigger the use of the AOF and provides details

on releases to be considered under each scenario. *Id.* Regarding climate conditions, the SEIS states:

> In the event that climate conditions including but not limited to, EI Nino, La Nina, and/or active hurricane season forecasts are projected to create or continue high lake levels, additional operational flexibility would allow releases to [Water Conservation Areas] and to tide (estuaries) to be implemented. The lake releases to tide (estuaries) should be limited to a pulse release from Lake Okeechobee not to exceed 2800 cfs measured at S-79 and 2000 cfs measured at the St. Lucie Estuary. This includes releases from all C&SF Project structures that discharge into the St Lucie Estuary. The wet spring of 2004 (normally the dry season) and an overly active hurricane season are examples of conditions that could be addressed with [AOF].

Exh. A at 85.

E. The Corps' Use of Additional Operational Flexibility at Issue in This Case

Two memoranda for the record, or MFRs, detailing the presence of conditions outside the Period of Record that LORS (and the LORS SEIS) anticipated, were prepared by the Corps in late 2018 and early 2019. These October 2018 and February 2019 MFRs document the Corps' decision to implement the "Operational Strategy for October 2018 Additional Operational Flexibility" and the "Operational Strategy for February 2019 Additional Operational Flexibility." These MFRs, and their attached Operational Strategies, are the focus of Plaintiff's Complaint.

1. 2018 Memorandum for Record

Beginning in late October 2018 the Corps used the additional operation flexibility within LORS to release more water than is called for in Parts C and D of LORS to assist in lowering Lake Okeechobee during the dry season. The Corps used AOF to address unique circumstances that collectively were not evaluated for the Period of Record (1965-2005) and memorialized its findings in a Memorandum for the Record dated October 26, 2018. 2018 MFR at 1 (ECF 1-4 at 2). As noted, the Water Control Plan expressly contemplated that future events similar to those experienced under the Period of Record would be effectively managed by the regulation schedule in Parts A-D, but that occasionally AOF would be used to address circumstances that were not collectively evaluated for the Period of Record. *See* LORS at p. 7-29 (ECF 1-4 at 50).

In the 2018 MFR, the Corps identified these collective circumstances, which include construction on the Herbert Hoover Dike, frequent climate oscillations, extreme high water, major tropical events, harmful algal blooms, and estuarine salinity issues. 2018 MFR at 1(ECF 1-

4 at 2). The 2018 MFR discusses these and other factors in more detail at pages five and six (ECF 1-4 at 6-7).

In the 2018 MFR, the Corps also reviewed and analyzed the environmental and human health effects contemplated in the original 2008 LORS Final SEIS, specifically, Lake Okeechobee Ecology, Endangered Species, Harmful Algal Blooms, Water Quality, Estuaries, Socioeconomics, Water Supply, and the Herbert Hoover Dike. 2018 MFR at 8-9 (ECF 1-4 at 9-10).

The bottom line was this: in light of conditions experienced over the last several years on Lake Okeechobee and the surrounding areas as well as anticipated above normal dry season rainfall, the Corps employed AOF to best manage the lake and its outflows. The extra releases called for by the 2018 MFR were to be capped at a total of 164,600 acre-feet above what LORS Part D calls for. 2018 MFR at 7 (ECF 1-4 at 8).

As contemplated in LORS, the public was notified of the Corps' planned use of additional operational flexibility, the desired outcome, and the implementation time period *via* the Corps' normal water management notification process (press release, internet webpage). MFR at 7 (ECF 1-4 at 8); LORS at p. 7-29 (ECF 1-4 at 50). The MFRs and Operational Strategies from both October 2018 and February 2019 were posted on the Corps' website,[5] and the Corps' releases were announced in press releases.[6] In addition, the Corps announced and discussed the use of additional operational flexibility through its Lake Okeechobee Periodic Scientists Calls, which are open to the public.

2. 2019 Memorandum for Record

As the releases approached the limit of 164,600 acre feet, on February 22, 2019, the Corps issued another Memorandum for Record, for the use of additional operational flexibility. In deciding to implement the AOF, the Corps stated:

> The forecast calling for an El Niño this 2019 spring brings a higher risk of above normal rainfall during the dry season, followed by a forecast for above average

[5] See https://www.saj.usace.army.mil/About/Divisions-Offices/Planning/Environmental-Branch/Environmental-Documents/ (click on "Multiple Counties" under Environmental Documents, and scroll down.)

[6] See https://www.saj.usace.army.mil/Media/News-Releases/Article/1672591/corps-to-maintain-flows-from-lake-okeechobee/ and https://www.saj.usace.army.mil/Media/News-Releases/Article/1764322/corps-takes-action-to-lower-lake-okeechobee-in-advance-of-wet-season/

> rainfall in the wet season, could lead to higher Lake Okeechobee stages, increased risk to Lake ecology (submerged and emergent aquatic vegetation) increased risk of harmful algal blooms, and high flows to the estuaries during the spring and summer of 2019. As of 11 February 2019, Lake Okeechobee is at 12.70 ft., in the Base Flow sub-band. AOF identified in LORS is needed to avoid continued impacts to Lake Okeechobee and estuarine ecology as well as reduce the risk of potential future [Harmful Algal Blooms] during the wet season and additional harm to the south Florida communities and economies that depend on a healthy lake and estuaries. USACE will evaluate conditions continuously to determine the recommended lake releases. The recommended flows, while utilizing this AOF will be within the LORS water control plan guidance for low flow volumes (up to 2,000 cfs out of S-79 and 730 cfs to the St. Lucie Estuary), see LORS SEIS section 3.6.c on Low Volume Releases. These low volume releases are intended to continue the lake recession that started in 26 October 2018 while taking into account the lake and estuary ecology.

2019 MFR at 6-7 (ECF 1-5 at 7-8). The 2019 Operational Strategy did not contain a cumulative limit or cap on releases, but it stated that the use of AOF would end when the 2019 wet season begins (typically between mid-May and mid-June).

By their terms, use of additional operational flexibility documented in the 2018 and 2019 MFRs was limited to the 2018-19 dry season and accordingly expired in June, 2019. 2018 MFR at 1, 8, 9, and Attachment 1 (ECF 1-4 at 2, 9-10, 11-16); 2019 MFR at 1 (ECF 1-5 at 2). As described in the attached declaration of Luis Alejandro, Chief of the Water Management Section of the Engineering Division's Water Resources Engineering Branch for the Corps' Jacksonville District, the use of additional operational flexibility documented in the MFRs has ended and the timeframe for implementing the water releases based on additional operational flexibility is over. Exh. B ¶ 4. *See also id*. ¶ 5 ("The Corps last used the additional operational flexibility documented in the MFRs on May 31, 2019. All subsequent Lake Okeechobee release decisions have followed the guidance in the Water Control Plan.")

III. LEGAL STANDARDS

A. The National Environmental Policy Act

Congress passed NEPA to focus governmental and public attention on the potential environmental effects of any proposed "major Federal action." *See* 42 U.S.C. § 4332(2)(C); *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989). NEPA is "essentially procedural[.]" *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978). The statute does not mandate particular results, instead prescribing a process to ensure that federal decision-makers consider, and that the public is informed about, a proposed action's potential

environmental consequences. *Wilderness Watch & Pub. Emps. for Envtl. Responsibility v. Mainella*, 375 F.3d 1085, 1094 (11th Cir.2004) ("NEPA essentially forces federal agencies to document the potential environmental impacts of significant decisions before they are made, thereby ensuring that environmental issues are considered by the agency and that important information is made available to the larger audience that may help to make the decision or will be affected by it") (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989))). "NEPA imposes procedural requirements rather than substantive results, and so long as an agency has taken a 'hard look' at the environmental consequences, a reviewing court may not impose its preferred outcome on the agency." *Wilderness Watch*, 375 F.3d at 1094 (citing *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 546 (11th Cir.1996)).

To achieve these aims, NEPA requires the preparation of an Environmental Impact Statement for any major federal action "significantly affecting the quality of the human environment[.]" 42 U.S.C. § 4332(2)(C). In some circumstances an agency is required to supplement an EIS to assess the unexpected. The Eleventh Circuit summarizes this duty as follows:

> If, after the original EIS is prepared, the agency 'makes substantial changes in the proposed action that are relevant to environmental concerns,' or if there are 'significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts,' the agency is required to prepare a supplemental environmental impact statement (SEIS).

Sierra Club v. U.S. Army Corps of Eng'rs (*Suncoast Pkwy. Case*), 295 F.3d 1209, 1215 (11th Cir. 2002) (quoting 40 C.F.R. § 1502.9(c)(1)). Significantly, "an agency need not supplement an EIS every time new information comes to light after the EIS is finalized." *St. Johns Riverkeeper v. U.S. Army Corps of Eng'rs*, 304 F. Supp. 3d 1229, 1238 (M.D. Fla. 2018) (citing *Marsh*, 490 U.S. at 373). Such a requirement would "render decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." *Id*. Thus, it is only where "new, significant effects are shown," that an agency must prepare a supplemental environmental impact statement (SEIS). *Id*., quoting *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1360 (11th Cir. 2008). A supplement is necessary "if the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered . . ." by the federal

agency. *Marsh*, 490 U.S. at 374 (quoting 42 U.S.C. § 4332(2)(C)); see also *Suncoast Pkwy. Case*, 295 F.3d at 1216.

B. Motions to Dismiss under Rules 12(b)(1) and 12(b)(6)

Motions made pursuant to rule 12(b)(1), which question a district court's subject matter jurisdiction, come in two forms: "facial attacks" and "factual attacks." *Lawrence v. Dunbar*, 919 F.2d 1525, 1528–29 (11th Cir.1990). Facial attacks only require the court to determine if the plaintiff has alleged a sufficient basis for subject matter jurisdiction. *Id*. at 1529. As such, the allegations within the complaint are assumed true for the purpose of the motion. *Id*.[7] Factual attacks challenge the existence of subject matter jurisdiction irrespective of what the complaint alleges. *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256, 1260–61 (11th Cir.1997). Accordingly, in a factual attack, courts may consider information outside of the pleadings —including testimony, affidavits, and other evidence—and "may make factual findings necessary to resolve the motion." *Hawthorne v. Baptist Hosp., Inc*., No. 3:08cv154/MCR/MD, 2008 WL 5076991, at *2 (N.D. Fla. Nov. 24, 2008).

Ordinarily, challenges to a party's standing are factual attacks on the district court's subject matter jurisdiction that require the court to look beyond the four corners of the complaint. *See Garcia*, 104 F.3d at 1260–61. In this case, Defendants' challenge to Plaintiff's standing rests, in part, on the pleadings. But even in a facial challenge to the Court's jurisdiction documents that are integral to (or attached to) the Complaint may be relied upon. *See Lane v. Guar. Bank*, 552 F. App'x 934, 937 (11th Cir. 2014) ("courts 'ordinarily examine . . . documents incorporated into the complaint by reference' in ruling on motions to dismiss" (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 322 (2007))); *In re Physician Corp. of Am. Sec. Litig*., 50 F. Supp. 2d 1304, 1312 (S.D. Fla. 1999) (deciding motion to dismiss on the basis of public documents that were, *inter alia*, "referenced repeatedly by Plaintiffs in the Complaint as a basis of the allegations")

On motions to dismiss under Federal Rule 12(b)(6) the court accepts the complaint's allegations as true. *Linder*, 963 F.2d at 334; *Latin Am. Agribusiness Dev. Corp. S.A.*, 711 F.2d at

[7] Facial attacks under Rule 12(b)(1) are thus analogous to motions to dismiss under Federal Rule 12(b)(6), on which the court accepts the complaint's allegations as true. *Linder v. Portocarrero*, 963 F.2d 332, 334 (11th Cir.1992); *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp. S.A.*, 711 F.2d 989, 994 (11th Cir.1983).

994. But here too documents integral to the complaint's allegations may be relied upon without converting the motion into a motion for summary judgment. *Bickley v. Caremark Rx, Inc.*, 461 F.3d 1325, 1329 n.7 (11th Cir. 2006) ("A court is generally limited to reviewing what is within the four corners of the complaint on a motion to dismiss. However, . . . where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleading for purposes of Rule 12(b)(6) dismissal, and the defendant's attaching such documents to the motion to dismiss will not require conversion of the motion into a motion for summary judgment" (citation and internal quotation marks omitted)).

In this case the rule described in the preceding paragraphs applies to the LORS and Water Control Plan documents, and the MFRs, which the Complaint incorporates and to which the Complaint refers throughout. *See* Complaint (ECF 1) (referring to LORS and the Water Control Plan (2008 Regulation Schedule) a total of fifty-six times, and referring to the MFRs a total of nineteen times); Complaint Exh. D (ECF 1-4) (LORS and Water Control Plan, and 2018 MFR); Complaint Exh. E (ECF 1-5) (2019 MFR). The rule also applies to the SEIS prepared in conjunction with the LORS and Water Control Plan, to which the Complaint refers throughout. *See* Compl. (referring to the SEIS ("2007 EIS") a total of seventeen times). The SEIS may also be consulted as a public record. *See United States ex rel. Payton v. Pediatric Servs. of Am., Inc.*, No. CV416-102, 2017 WL 3910434, at *5 (S.D. Ga. Sept. 6, 2017) ("Because Rule 12(b)(1) does not restrict the Court's ability to review additional documentation and Defendants' documents are public records, the Court may consider them in ruling on Defendants' motions to dismiss.")

IV. ARGUMENT

A. Plaintiff's Claims are Moot

Article III of the Constitution limits the jurisdiction of the federal courts to the consideration of "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1. A case is moot when the issues no longer involve a live case or controversy with respect to which the court can provide meaningful relief. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 45 (1997); *Murphy v. Hunt*, 455 U.S. 478, 481 (1982); *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1183 (11th Cir.2007). Because it is jurisdictional mootness necessitates dismissal. *See Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir.2001). Indeed, "[a]ny decision on the merits of

a moot case or issue would be an impermissible advisory opinion." *Fla. Ass'n of Rehab. Facilities v. Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1217 (11th Cir. 2000).

Here, Plaintiff asks that the MFRs "be set aside" (ECF 1 at 25), and that the Court "[e]njoin Defendants from implementing additional operational flexibility." Both demands are moot because the Corps' use of the AOF documented in the MFRs is done.

The completion of agency action which forms the basis of a claim generally renders that claim moot. *See, e.g.*, *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100, 1103 (5th Cir.1981) (injunctive claims moot when project completed); *Wallace v. Bureau of Land Mgmt.*, 169 Fed.Appx. 521, 523–24 (10th Cir.2006) (rancher's challenge to expired grazing permit seeking declaratory relief was moot); *Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189 F.3d 851, 855 (9th Cir.1999) ("In this case, the challenged permit has expired and therefore the issues regarding [the] permit are moot unless the issuance of a one-year permit falls within the repetition/evasion exception to the mootness doctrine.")[8] The MFRs documented how the Corps would exercise its authority to implement a specific AOF regimen, as had been anticipated in the LORS SEIS. The timeframes for implementing the AOF addressed in the MFRs have expired. The 2018 MFR recited that the use of AOF under the October 2018 Operational Strategy would be limited to "before 1 June and the start of the 2019 hurricane season." 2018 MFR at 1 (ECF 1-4 at 2); see *id*. at 8 (ECF 1-4 at 9) (AOF to be utilized "prior to [the] end of the dry season (31 May 2019)"); *id*. at 9 (ECF 1-4 at 10) ("AOF releases to be used "throughout the 2018-2019 dry season."); *id*. at Attachment 1 at 1 (ECF 1-4 at 12 ("The Corps will utilize additional operational flexibility (AOF) … to assist with lowering Lake Okeechobee down before the wet season 2019"). The 2019 MFR (at 1) was equally clear that the AOF described in the MFR would terminate with the inception of the wet season in June: "The USACE will utilize AOF to release more water from the lake than is called for in Parts C and D to assist a continued lake level recession from February through May." ECF 1-5 at 2.

The 2018-19 dry season is behind us. The circumstances giving rise to the Corps' actions documented in the challenged MFRs have concluded. Because the operational strategies

[8] We note that the "repetition/evasion exception" referred to "applies only in exceptional situations," *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983), where "the challenged action is in its duration too short to be fully litigated prior to cessation or expiration," and "there is a reasonable expectation that the same complaining party will be subject to the same action again." *United States v. Juvenile Male*, 564 U.S. 932, 938 (2011).

described in the MFRs that Plaintiffs challenge are no longer operative, the claim that they violated NEPA is moot. *Id*., *Nat'l Parks Conservation Ass'n v. U.S. Army Corps of Eng'rs*, 574 F. Supp. 2d 1314, 1320-21 (S.D. Fla. 2008) (holding that expiration of the challenged Corps permit rendered the plaintiff's NEPA and APA claims moot, and citing numerous other cases with similar holdings); *Save the Wekiva River and Headwaters, Inc. v. U.S. Army Corps of Eng'rs*, No. 6:17-CV-1902-ORL-DCI, 2017 WL 10086128 (M.D. Fla. 2017) (same); *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt*., 460 F.3d 13, 18 (D.C. Cir. 2006) (NEPA claim against Bureau of Land Management was moot, because BLM memorandum, by its terms, was "short-term, temporary" document according to BLM's manual and had expired).

The exercises of AOF that Plaintiff challenges are history. Alejandro Decl. (Exh. B) ¶¶ 3-4 ("The implementation periods for the use of additional operational flexibility as reflected in the MFRs have ended. As such, the Corps is no longer using the additional operational flexibility described in the MFRs."). It is of course possible that, in the years to come, circumstances may lead to the Corps' development and publication of a new MFR to document a lake level management decision with which Plaintiff may take issue,[9] but the Court is "not at liberty to hypothesize such future occurrences." *Nat'l Parks Conservation Ass'n*, 574 F. Supp. 2d at 1321-22. Any concern Plaintiff may have about possible future MFRs or future uses of AOF are also non-actionable, because, absent final agency action, the Court is without jurisdiction under the APA. *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1236 (11th Cir. 2003) ("[J]urisidiction is . . . lacking when the administrative action in question is not 'final' within the meaning of 5 U.S.C. § 704.").

A party asserting mootness bears a "heavy burden" of showing that the challenged conduct cannot reasonably be expected to start again. *Mainella*, 375 F.3d at 1090 n. 6. Here, the Corps can no longer make releases under the 2018-19 operational strategies because the timeframe for their implementation has expired. Plaintiff's Complaint requests that the Court declare the Corps violated NEPA and the APA, set aside the 2018-19 MFRs, and "[e]njoin Defendants from implementing additional operational flexibility to lower Lake Okeechobee

[9] In accordance with LORS (at 7-29 (ECF 1-4 at 50)) any potential future exercises of additional operational flexibility would be announced to the public anew, based on future circumstances and defined by a desired outcome or time-period. As LORS emphasizes, "Each event to be addressed by additional operational flexibility is unique and releases to be implemented will be defined by a desired outcome or time-period." LORS at 7-8 (ECF 1-4 at 31).

below the water levels established in the 2008 Regulation Schedule." Compl. at 25. The requested relief would have no practical effect: the Corps' use of additional operational flexibility has ended. Plaintiff's claims are moot. *See, e.g.*, *Save the Bay*, 639 F.2d at 1103 (injunctive claims moot when project completed); *Fla. Wildlife Fed'n v. Goldschmidt*, 611 F.2d 547, 548 (5th Cir.1980) (same); *Nat'l Parks Conservation Ass'n*, 574 F.Supp.2d at 1320-21 (collecting cases).

B. Plaintiff Lacks Standing

1. Legal standards

Article III standing. Standing to bring and maintain a lawsuit is fundamental to invoking a federal court's subject matter jurisdiction. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340-42 (2006). "[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Id*., 547 U.S. at 341(internal quotation marks omitted). A litigant's standing to invoke the authority of a federal court "is an essential and unchanging part of [this] case-or-controversy requirement." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). As such, the elements of constitutional standing are well established.

First, a plaintiff must show that he has suffered an "injury-in-fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (internal quotation marks omitted). Second, a plaintiff's injury must be "fairly traceable to the challenged action of the defendant." *Id.*, 528 U.S. at 180. Finally, a plaintiff must demonstrate that "it is likely, as opposed to merely speculative, that the injury will be" redressed by a decision in his favor. *Id.* at 181. Although it is the plaintiff's burden to establish these standing elements, "general factual allegations of injury resulting from the defendant's conduct" are sufficient to survive a motion to dismiss. *Lujan*, 504 U.S. at 561.

In challenging Plaintiff's standing, we focus on the first and last of these three elements: injury-in-fact and redressability.

"Zone-of-interests" standing. A plaintiff demonstrating constitutional standing under Article III may nevertheless lack what was traditionally referred to as "prudential standing." *Lujan*, 504 U.S. at 560. Lack of prudential standing is equally fatal to a plaintiff asserting his claims. *Id*. The purpose of prudential standing is to ensure that the plaintiff is the type of person

for which the contested statute provides protection. *See Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1175 (11th Cir. 2006). The question is "whether the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

More recently, the Supreme Court has clarified that "prudential standing" is a "misnomer," *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014), and that whether a plaintiff's claim is within the zone of interests protected by a statute or regulation is not jurisdictional. *Id*. at 128 & 128 n.4. Instead of asking whether the plaintiffs have "prudential standing," we ask whether the plaintiffs "fall[ ] within the class of plaintiffs whom Congress has authorized to sue." *Id*. "Under the Administrative Procedure Act, a party may sue if 'the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute in question.'" *Kurapati v. U.S. Bureau of Citizenship & Immigration Servs*., 775 F.3d 1255, 1260 (11th Cir. 2014) (quoting *Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla*., 641 F.3d 1259, 1268 (11th Cir.2011).[10]

Often-quoted language in the APA context suggests that the zone of interests test "is not meant to be especially demanding," *Kurapati*, 775 F.3d at 1261(quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)), but the Supreme Court has "made clear" that that depends on the specific statutory context: "the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the '"'generous review provisions"' of the APA may not do so for other purposes.'" *Lexmark*, 572 U.S. at 130–31 (2014) (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)) (quoting *Clarke*, 479 U.S., at 400 n.16 (quoting *Data Processing*, 397 U.S. at 156))).

[10] Some courts, including this Court, have referred to the zone-of-interests test as a question of "statutory standing," *Ocampo v. Carrington Mortg. Servs*., LLC, 288 F. Supp. 3d 1327, 1333 (S.D. Fla. 2017), *appeal dismissed*, No. 18-10253-JJ, 2018 WL 1967962 (11th Cir. Apr. 11, 2018), which the Supreme Court has called "an improvement." *Lexmark*, 572 U.S. at 128 n.4. But whatever label is applied, and as the Ninth Circuit has noted, "the substance of the test remains unchanged." *Pit River Tribe v. Bureau of Land Mgmt*., 793 F.3d 1147, 1149 (9th Cir. 2015).

The issue not infrequently arises whether purely economic interests can confer zone-of-interests standing under NEPA. NEPA's primary purpose is, of course, environmental protection. 42 U.S.C. § 4321 (declaring Congress's purpose in enacting NEPA to include "encourag[ing] productive and enjoyable harmony between man and his environment" and "promot[ing] efforts which will prevent or eliminate damage to the environment"); 40 C.F.R. § 1500.1(c) (NEPA is intended to help public officials "take actions that protect, restore, and enhance the environment"). As noted by the Middle District in *RB Jai Alai, LLC v. Sec'y of Fla. Dep't of Transp.*, 47 F. Supp. 3d 1353 (M.D. Fla. 2014), the Courts of Appeals disagree as to whether NEPA affords protection to purely economic interests—i.e., whether a plaintiff can claim a violation of NEPA despite suffering no environmental injury. *Compare Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1038 (8th Cir.2002) (holding that purely economic interests may fall within NEPA's zone of interests if the provision at issue "evinces a concern for economic considerations") *with Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir.2005) ("[W]e have consistently held that purely economic interests do not fall within NEPA's zone of interests . . . ."). After noting that "the Eleventh Circuit has not squarely addressed the issue," the Middle District concluded that "this Court sides with those courts concluding that purely economic injuries with no connection to the environment are insufficient to fall within NEPA's zone of interests." *RB Jai Alai*, 47 F. Supp. 3d at 1363.

2. Plaintiff lacks Article III standing

Injury-in-fact. The Complaint evinces concern about the Corps' lowering of the level of Lake Okeechobee, apparently a source of water for Plaintiff's farming operations. The nature of Plaintiff's concern is plain: "Like other farmers in Florida, USSC must water its crops. . . . Droughts and antecedent low Lake level conditions adversely affect USSC's ability to deliver water to its crops." Compl. ¶¶ 16-17. But nowhere does the Complaint allege that Plaintiff has actually been harmed. The Complaint asserts, for example, that Plaintiff *may* suffer adverse consequences "when the Lake is at low levels, below 10.5 feet," *id*. ¶ 17-18, but then admits that "the current Lake stage [is] 11.65 [feet]," *id*. ¶ 75, and that the complained-of MFRs did no more than "create" a "risk" that lake levels *might* be reduced "below 11 feet." *Id*. ¶ 90. Thus the Complaint acknowledges that the Corps' use of AOF during the 2018-19 dry season only "result[ed] in the Lake [being] at the low level of 11.65 feet" – well above Plaintiff's alleged 10.5-foot threshold. *Id*. ¶12.

> Plaintiff seeks to address the injury-in-fact requirement head-on (Compl. ¶¶ 19-20):
>
> 19. Because of the Corps' wasteful release of freshwater, USSC has had difficulty delivering irrigation water to crops in the southern part of the EAA and in the vicinity of the L-8 canal.
>
> 20. USSC is adversely affected and damaged by the Corps' failure to comply with the APA and NEPA in lowering Lake Okeechobee outside of the 2008 Regulation Schedule.

None of these allegations suffices.

Paragraph 20 ("USSC is adversely affected") runs afoul of the rule that "a plaintiff must show standing by averring specific facts; conclusory allegations in a complaint or other pleading are insufficient to establish standing … ." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 301 F. Supp. 3d 50, 61 (D.D.C. 2018), citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888–89 (1990).[11] The alleged harm is the antithesis of the "concrete and particularized" harm necessary to satisfy the "injury-in-fact" requirement for Article III standing. *Friends of the Earth*, 528 U.S. at 180.

Paragraph 19 fares no better. While offering traces of specificity (referring to the "southern part of the [Everglades Agricultural Area] and in the vicinity of the L-8 canal") the only injury alleged is "difficulty delivering irrigation water to crops." Conspicuously absent are any suggestions that this "difficulty" resulted in any actual harm, such as increased expense or actual crop loss or damage. As noted in *Confederated Tribes of Grand Ronde Community of Oregon v. Jewell*, 75 F. Supp. 3d 387, 416–17 (D.D.C. 2014), *aff'd*, 830 F.3d 552 (D.C. Cir. 2016) "such generalized, vague notions of harm do not meet the injury in fact element required for Article III standing."

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[11] The language quoted from *Standing Rock Sioux* refers to the "summary judgment stage" of a case, and we note that the Supreme Court has held that unlike a motion for summary judgment, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Bennett*, 520 U.S. at 167-8, (quoting *Lujan*, 504 U.S. at 561). But it remains true that on a motion to dismiss "a plaintiff must show that he has suffered an 'injury-in-fact' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *RB Jai Alai*, 47 F. Supp. 3d at 1360 (quoting *Friends of the Earth*, 528 U.S. at 180).

Elsewhere (Compl. ¶ 111) Plaintiff asserts that "Water from Lake Okeechobee is critically necessary to USSC for crop irrigation and for preventing wildfires and soil loss." Plaintiff further asserts that "USSC faces an imminent decrease in the available water supply as a result of the low levels of Lake Okeechobee. . . . The Lake is an essential water supply source for USSC's agricultural operations. The Corps' actions directly and significantly affect the water supply available for USSC's State permitted water use and to prevent environmental harm on USSC's lands." Compl. ¶ 112. All of this boils down to the idea that the waters of the lake are important to Plaintiff and that, if those waters are diminished, Plaintiff *could* be injured in various ways. There is no specific claim that Plaintiff *has been* injured, and it is fundamental that such "conjectural or hypothetical" injury does not confer jurisdiction. *Friends of the Earth*, 528 U.S. at 180. Nor is there any content to the suggestion that some sort of harm is "imminent." ECF 1 ¶ 112. The Complaint was filed August 1, after AOF had ceased (as of June) and the wet season was well underway (see preceding section on mootness). And nothing in the Complaint suggests that the Corps will use additional operational flexibility to lower the lake past Plaintiff's alleged 10.5 foot threshold; to the contrary, the Corps' use of additional operational flexibility documented in the MFRs has ended.[12]

Redressability. In order for Plaintiffs to show that they have standing, they must demonstrate that their alleged injury is redressable by a favorable ruling or decision. *Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist*., 647 F.3d 1296, 1303-04 (11th Cir.2011). Because NEPA is strictly a procedural statute, the relief a court can provide is an order requiring

[12] Plaintiff also alleges a "procedural" injury. See ECF 1 ¶ 21 ("USSC also has a procedural interest in the Corps complying with its legal obligations under NEPA and the APA and suffers injury when the Corps fails to do so. As a result, USSC has suffered an injury in fact.") And it is true that in "procedural injury" cases under NEPA the injury-in-fact requirement "is relaxed." *RB Jai Alai*, 47 F. Supp. 3d at 1360. *See Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1171 (11th Cir. 2006) ("It is well settled that, in a NEPA suit, 'a cognizable procedural injury exists when a plaintiff alleges that a proper EIS has not been prepared . . . when the plaintiff also alleges a "concrete" interest—such as an aesthetic or recreational interest—that is threatened by the proposed actions'")) (quoting *Sierra Club v. Johnson*, 436 F.3d 1269, 1277-78 (11th Cir. 2006))). But the concrete injury requirement remains: "That is, for Article III purposes, we may recognize a 'procedural injury' when a procedural requirement has not been met, so long as the plaintiff also asserts a 'concrete interest' that is threatened by the failure to comply with that requirement." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004) (followed by the Eleventh Circuit in *Ouachita Watch League*, 463 F.3d at 1171). Plaintiff's inability to allege concrete harm is therefore equally fatal to its procedural injury claim.

additional procedures. Where as here a plaintiff alleges that an agency's project(s) required more NEPA analysis than was performed, "effective judicial relief" is possible "by enjoining completion of the project until NEPA's requirements are met." Constitutional standing requirements—Redressability, *NEPA Law and Litig*. § 4:23 (2019) (collecting cases). But where, as here, the actions complained of are finished, no amount of additional NEPA analysis can be of any practical benefit. In these circumstances mootness and non-redressability substantially overlap. *See, e.g.*, *WildEarth Guardians v. Pub. Serv. Co. of Colorado*, 690 F.3d 1174, 1185 (10th Cir. 2012) ("The plaintiff bears the burden to establish standing at the time the suit is filed, and if the defendant's offending conduct has ceased by that time, we dismiss for lack of redressability.")

3. Plaintiff lacks zone-of-interest standing[13]

The Middle District in *RB Jai Alai*, finding no definitive guidance from the Eleventh Circuit, agreed with those circuits that hold that "purely economic injuries with no connection to the environment are insufficient to fall within NEPA's zone of interests." *RB Jai Alai*, 47 F. Supp. 3d at 1363. In this connection we also note that the Eleventh Circuit, by way of analogy, cited and partly relied upon the Eighth Circuit's holding in *Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411 (8th Cir. 1976) that "economic injury alone [is] not sufficient for standing under NEPA." *Nasser v. City of Homewood*, 671 F.2d 432, 437 (11th Cir. 1982) (summarizing *Churchill Truck Lines*). Denying NEPA standing to those alleging only economic interests makes sense. The environmental values that NEPA promotes are often at odds with industry's economic interests. Agencies of course routinely balance economic and environmental (and other) considerations when applying NEPA, and nothing in NEPA prevents an agency from concluding that economic interests should, in a given situation, prevail. But absolutely nothing in the statute suggests that Congress intended that NEPA become a vehicle for the vindication of purely economic interests. *Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions.")

[13] A motion to dismiss under the zone-of-interests test is made "under Rule 12(b)(6) for failure to state a claim for relief." *Triaxx Prime CDO 2006-1, Ltd. v. Ocwen Loan Servicing, LLC*, 762 F. App'x 601, 604 n.6 (11th Cir. 2019).

The idea that purely economic injuries fall outside NEPA's zone of protected interests has also emerged as the majority rule. *Maiden Creek Assocs., L.P. v. U.S. Dep't of Transp.*, 823 F.3d 184, 194 (3d Cir. 2016) ("The vast majority of NEPA authority makes clear that economic injury alone does not satisfy the statute's zone of interests test" (collecting cases)).

Plaintiff does not allege that its corporate charter in any way dedicates the company to promoting environmental quality. And while the Complaint is replete with allegations that excessive draw-downs of Lake Okeechobee may cause a variety of environmental harms, there is no basis for concluding that any of those hypothetical environmental harms constitute injuries *to Plaintiff*. *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1172 (11th Cir. 2006) ("The proper focus . . . is not harm to the environment, but harm to the plaintiffs" (citation omitted)). *Robinson v. Knebel*, 550 F.2d 422, 424 (8th Cir. 1977) provides a useful contrast. There, individual plaintiffs alleged not only economic injury but also that defendant's NEPA noncompliance negatively impacted their big game hunting. *Id.* at 425. Prudential standing would be absent, the court noted, where, as here, "plaintiffs … had not alleged any environmental injury to themselves." *Id.* at 424 (distinguishing *Churchill Truck Lines*).

Prudential standing also defeats Plaintiff's allegation of "procedural" injury (ECF 1 ¶ 21, *see* fn. 13 *supra*), because the interests threatened (here, purely economic) must be those the statute in question was designed to advance. *Wildlaw v. U.S. Forest Serv.*, 471 F. Supp. 2d 1221, 1234 (M.D. Ala. 2007) (quoting *Defenders of Wildlife*, 504 U.S. at 573 n. 8) ("In order to succeed under the 'procedural injury' doctrine, a plaintiff must demonstrate that 'the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing . . .). NEPA is not "designed" to protect Plaintiff's economic interests.

V. CONCLUSION

For the foregoing reasons, defendants respectfully request that the complaint be dismissed in its entirety.

Respectfully submitted this 21st day of October, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of October, 2019, I filed the foregoing using the United States District Court CM/ECF, which caused all counsel of record to be served electronically.

/s/ Peter Kryn Dykema
PETER KRYN DYKEMA