No. 18-30257

In the United States Court of Appeals for the Fifth Circuit

ATCHAFALAYA BASINKEEPER; LOUISIANA CRAWFISH PRODUCERS ASSOCIATION-WEST; GULF RESTORATION NETWORK; WATERKEEPER ALLIANCE; SIERRA CLUB, and its Delta Chapter,

Plaintiffs-Appellees

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant-Appellant

BAYOU BRIDGE PIPELINE, L.L.C.; STUPP BROTHERS, INCORPORATED, doing business as Stupp Corporation,

Intervenor Defendants-Appellants

On appeal from the United States District Court for the Middle District of Louisiana, Case No. 3:18-cv-23 (Judge Shelly D. Dick)

Brief of Appellant United States Army Corps of Engineers

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Statement Regarding Oral Argument

The United States requests oral argument because it will help to answer any questions that the Court may have regarding the complex analysis undertaken by the United States Army Corps of Engineers in this case.

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EA	Environmental Assessment
EIS	Environmental Impact Statement
FONSI	Finding of No Significant Impact
NEPA	National Environmental Policy Act
LRAM	Louisiana Wetland Rapid Assessment Method

Statement of Jurisdiction

The claims in this case are brought under the National Environmental Policy Act, the Clean Water Act, and the Rivers and Harbors Act of 1899. ROA.43-66. The district court has jurisdiction to hear these claims under "federal question" jurisdiction. 28 U.S.C. § 1331. The district court granted plaintiff-appellee's motion for preliminary injunction in a ruling issued February 27, 2018. ROA.3998-4057. The United States filed a timely notice of appeal of that order on March 30, 2018. This Court has jurisdiction over this appeal of an interlocutory order granting a preliminary injunction under 28 U.S.C. § 1292(a)(1).

Statement of the Issues

1. Did the district court apply the wrong law in holding that the United States Army Corps of Engineers (the "Corps") should have included a detailed discussion of mitigation measures in its environmental assessment, even though the Corps had not made a "mitigated" "finding of no significant impact" ("FONSI")?

2. Did the district court err in holding that the Corps had not adequately explained the mitigation measures required in the subject permit where the record shows that the Corps assessed the impacts of the construction of the subject pipeline on wetlands and then used its "Louisiana Wetlands Rapid Assessment Method" ("LRAM") to determine the appropriate type and amount of mitigation?

3. Did the district court compound that error in also holding that the Corps had failed to consider the cumulative impacts of the permit?

4. Did the district court abuse its discretion by enjoining the construction of a portion of the pipeline when its impact on aquatic functioning will be mitigated and the only error identified by the court was a supposed lack of adequate explanation of the Corps' reasoning?

5. Is the district court's injunction overbroad because it enjoins not only the construction that the court found would cause irreparable harm, but also administrative actions by the Corps?

Statement of the Case

I. The law

A. The Clean Water Act

The Clean Water Act prohibits the discharge of pollutants (including dredged spoil, rock, and sand) into the waters of the United States (including wetlands) from any point source. 33 U.S.C. § 1311(a). Section 404 of the Act, *id.* § 1344, authorizes the Corps to issue permits for the discharge of dredged or fill material when certain conditions are met. *Id.* §§ 1311(a); 1344. Where adverse impacts to aquatic resources from a permitted activity cannot be avoided, permit applicants may be required to provide compensatory mitigation. 33 C.F.R. §§ 332.2 (definition of "compensatory mitigation"), 332.3(a) (general mitigation requirement).

B. The Rivers & Harbors Act of 1899

Section 10 of the Rivers and Harbors Act of 1899 forbids certain activities within the "navigable water of the United States" without the Corps' permission. 33 U.S.C. § 403; *see also* 33 C.F.R. § 322.3(a) (requiring permits under Section 10 for "structures and/or work in or affecting navigable waters of the United States"). For the purposes of Section 10, the Corps' regulations define navigable waters as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4.

Section 14 of the Rivers and Harbors Act of 1899 makes it unlawful for a person to "take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, . . . or in any manner whatever impair the usefulness of any . . . work built by the United States, . . . in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods." 33 U.S.C. § 408(a) ("Section 408"). The Corps "may," however, permit the alteration, permanent occupation, or use of such public works when, in its judgment, such activity (1) "will not impair the usefulness of such work" and (2) "will not be injurious to the public interest." *Id*.

C. The National Environmental Policy Act

The National Environmental Policy Act ("NEPA") is a procedural statute that does not mandate substantive results. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). NEPA requires federal agencies to

prepare a detailed environmental impact statement for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). But an agency may prepare a shorter, less-detailed environmental assessment first; if the agency makes a finding of no significant impact ("FONSI") based on that environmental assessment, then it is not required to prepare an environmental impact statement. 40 C.F.R. §§ 1501.3, 1508.9(a). Even if a project would otherwise have significant impacts, an agency may still rely on an environmental assessment (and make a FONSI) if mitigation would render those impacts not "significant." This is known as a "mitigated" FONSI.

II. The facts and the history of the case

On December 14, 2017, the Corps issued a permit under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, and Sections 10 and 14 of the Rivers and Harbors Act, 33 U.S.C. §§ 403, 408, to Bayou Bridge Pipeline, LLC ("Bayou Bridge"). The Corps' authorizations will allow Bayou Bridge to build a 162-mile-long pipeline to convey crude oil from Lake Charles, Louisiana, to terminals near St. James, Louisiana. Because portions of the pipeline will cross the Atchafalaya Basin, the construction of the pipeline—most notably, the discharge of dredge or fill material—will affect wetlands. As part of its responsibilities under the Clean Water Act, the Corps required Bayou Bridge to mitigate those impacts.

On January 11, 2018, the plaintiffs—Atchafalaya Basinkeeper, Louisiana Crawfish Producers Association-West, Gulf Restoration Network,

Waterkeeper Alliance, and Sierra Club and its Delta Chapter (collectively, "Basinkeeper")—sued the Corps, seeking to set aside the Corps' action. Bayou Bridge and one of its contractors, Stupp Brothers, Inc., intervened as defendants. On January 29, Basinkeeper sought both a temporary restraining order and a preliminary injunction. The district court denied the temporary restraining order the next day, ruling that Basinkeeper had failed to demonstrate a likelihood of success on the merits. The district court ordered the Corps and Bayou Bridge to file responses to the request for a preliminary injunction on February 2. The court conducted an evidentiary hearing on February 8, heard argument on February 9, and ordered supplemental briefs to be filed by February 12. On February 23, the district court entered a brief order preliminarily enjoining the Corps and Bayou Bridge from taking any action on the project.

On February 27, 2018, the district court issued a written order explaining its rationale and limiting the injunction to the Atchafalaya Basin. ROA.3998-4057. The district court concluded that Basinkeeper was not likely to succeed on most of the issues raised by its preliminary injunction motion. *See, e.g.,* ROA.4015-26 (holding that Basinkeeper was not likely to succeed on its claim that the Corps had failed to analyze the risks of an oil spill). But the district court—based on the limited record before it that could be compiled for the expedited preliminary injunction proceedings—faulted the Corps for its analysis of mitigation and cumulative effects. ROA.4036-48. The court held

that Basinkeeper was entitled to a preliminary injunction, regardless of the applicable legal standard. ROA.4041 n.94.

Bayou Bridge appealed and sought a stay from this Court. This Court granted that stay on March 15. Court Order, Doc. No. 00514388428 (Mar. 15, 2018). Judge Clement wrote for the panel, concluding that Bayou Bridge was likely to succeed on its claim that the district court abused its discretion. "Rather than granting a preliminary injunction, the district court should have allowed the case to proceed on the merits and sought additional briefing from the Corps on the limited deficiencies noted in its opinion." *Id.* at 2. Judge Owen concurred and wrote separately, opining that the district court should have remanded to the Corps without vacating the permit if there was a mere failure of explanation and that Bayou Bridge had made a showing that halting construction would be "disruptive." *Id*. at 4. Judge Davis dissented. *Id*. at 5–6.

Summary of Argument

The Corps does not regulate the construction of oil pipelines. Congress has not given it that authority. *See Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 33 (D.C. Cir. 2015). Instead, the Corps' role in the Bayou Bridge pipeline was limited: it gave Bayou Bridge permission to cross several federal easements and Corps projects meant to improve the navigability of rivers or to prevent floods. And it granted a permit to Bayou Bridge under Section 404 of the Clean Water Act that will allow Bayou Bridge to discharge some of the

dredge and fill created by the construction of this pipeline into the waters of the United States (including wetlands).

The Corps analyzed the potential environmental impacts of these aspects of the pipeline—especially the discharge of fill into wetlands—in great detail in the two environmental assessments that it prepared under NEPA. As part of that analysis, the Corps used a tool that it has developed to protect Louisiana wetlands, the Louisiana Wetlands Rapid Assessment Method ("LRAM"). It found that about 597 acres of wetlands would be affected—about 455 temporarily and about 142 permanently converted from forested wetlands to herbaceous wetlands. The Corps then required Bayou Bridge to buy "credits" from approved mitigation banks that would more than offset that loss of aquatic functioning. As a result, Bayou Bridge was required to protect over 700 acres of wetlands before it could undertake this project.

Basinkeeper brought a host of challenges to the Corps' actions, and the district court rejected nearly all of them. But it did rule that the Corps had failed to sufficiently explain its analysis of this mitigation plan. And it also ruled that the Corps had failed to give enough consideration to "cumulative impacts."

But the district court reached those findings—and granted Basinkeeper's preliminary injunction—in error. On their face, the Corps' environmental assessments explain the Corps' reasoning. If the district court did not see that reasoning, it was only because it did not fully understand either the analytic tool used by the Corps here (the LRAM) or the meaning of the Corps' use of

that tool. Rather than enjoining this project, the district court should have sought additional explanation from the Corps (which the Corps would have readily provided) or resolved the case on a fuller administrative record (which would have provided additional detail on the calculations underlying the Corps' analysis). But even without such additional detail, the Corps' path here can "reasonably be discerned" from its environmental assessments (and other publicly-available documents) and should have been upheld. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (internal quotation marks omitted). For these reasons, the district court's grant of preliminary injunction should be reversed.

Standard of Review

A party seeking a preliminary injunction must demonstrate four elements: (1) that it is likely to succeed on the merits; (2) that it would suffer irreparable injury if the injunction were not granted; (3) that the balance of the equities tips in its favor; and (4) that the public interest would be furthered by the injunction. *Jones v. Tex. Dept. of Crim. Justice*, 880 F.3d 756, 759 (5th Cir. 2018); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The district court's decision to grant Basinkeeper's motion for injunctive relief, as well as its weighing of the preliminary injunction factors, is reviewed for abuse of discretion, with legal rulings reviewed *de novo* and findings of fact for clear error. *Anderson v. Jackson*, 556 F.3d 351, 360 (5th Cir. 2009).

Argument

I. The district court applied the wrong law by holding the Corps' environmental assessment to the standard for a "mitigated" FONSI.

The district court held that the Corps' "environmental assessment" was inadequate and violated NEPA because it failed to adequately explain the mitigation measures that will be used to offset the adverse environmental effects of the construction of the pipeline. ROA.4041. But the district court misunderstood the role that mitigation played in the Corps' NEPA analysis, and, as a result, it applied the wrong law. In so doing, the court abused its discretion and should be reversed.

NEPA is a procedural statute. It requires a federal agency to prepare a detailed environmental impact statement if its action (or an action that it permits) will have a "significant" impact on the human environment. *See* 42 U.S.C. § 4332(C). On the other hand, if the proposed action will not have a significant impact, then the agency may make a "finding of no significant impact" ("FONSI") after it prepares a more-limited environmental assessment of the action's effects. 40 C.F.R. §§ 1501.3, 1508.9(a).

In either event, because NEPA is procedural, it never *requires* agencies to mitigate adverse environmental effects. *See, e.g., Robertson*, 490 U.S. at 352–53. Importantly, NEPA's requirements here are separate and distinct from the requirements of the Clean Water Act (and its regulations and guidelines), which does require compensatory mitigation in some cases (and which we discuss below).

As a general rule, NEPA does not require environmental assessments to discuss mitigation measures at all. *Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1147 (9th Cir. 2000). The exception to that rule is the so-called "mitigated FONSI." *See generally* Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76 Fed. Reg. 3843 (Jan. 21, 2011). In a "mitigated FONSI," an agency relies on mitigation measures to reduce the potentially significant effects of a proposed action until they are no longer "significant." *Id*. at 3846. A mitigated FONSI enables the agency to comply with NEPA by preparing an environmental assessment instead of a full environmental impact statement, even if the impacts of the unmitigated action would have been significant. *Id*. The Council on Environmental Quality ("CEQ"), which administers NEPA, recommends that environmental assessments for mitigated FONSIs include a discussion of mitigation measures. *Id*. at 3848. This Court has approved the use of mitigated FONSIs. *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225, 231 (5th Cir. 2007) (citing cases).

The rules governing an agency's use of a "mitigated FONSI" do not apply here, however, because the Corps simply *did not make* a "mitigated FONSI." That is, the Corps never found that the impacts of the construction activities authorized by its permit would be "significant." To the contrary, the Corps found that those impacts were not significant, *even without mitigation*. *See* ROA.1622, 1691-92, 1803, 1841. The Corps reached that conclusion, in part,

because the activities authorized by the Corps were designed from the outset to avoid and reduce their potential impacts on the environment (through, for example, the use of "horizontal directional drilling" technology and by siting the pipeline along an existing right-of-way), and because the Corps' authorizations affect only a very small part of the 1.4-million-acre Atchafalaya Basin. *Id*.

Thus, because the Corps did not find that the impacts would be significant "but for" these mitigation measures, the Corps did not need to explain how that mitigation would reduce those impacts below the threshold of NEPA "significance" (and was under no legal obligation to do so). The district court, however, mistook the Corps' FONSI for a "mitigated FONSI," and then held that the Corps had violated NEPA because its "Section 404 [environmental assessment] fails to demonstrate that the chosen mitigation measures effectively address and remediate the adverse impacts *such that a FONSI was proper*." ROA.4041 (emphasis added). That is, the district court found that the environmental assessment failed to show how these mitigation measures would reduce the effects of the authorized discharges from the construction of this pipeline "to a less-than-significant level." *Id*.

This was an abuse of discretion. The Corps' environmental assessment was not required to show how mitigation measures would reduce the effects of the authorized discharges below "significance" because the Corps never concluded that those effects would be "significant" in the first place. The Corps' finding was not a mitigated FONSI, and the district court erred by

holding the Corps' environmental assessment to the legal standard for a mitigated FONSI.

In holding that the Corps had violated NEPA, the district court relied heavily on this Court's decision in *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225 (5th Cir. 2007). *O'Reilly* held that the Corps violated NEPA by relying on a "cursory" discussion of mitigation measures—that failed to explain how those measures would "reduce . . . impacts to a less-than-significant level"—when it issued a "*mitigated FONSI.*" *Id*. at 234 (emphasis added). That holding does not apply here because, as we have explained, this case does not involve a mitigated FONSI, and NEPA does not otherwise require the Corps to discuss mitigation measures in an environmental assessment. Because the district court applied the wrong law, its NEPA holding is also wrong (and necessarily an abuse of discretion), and it should be reversed.

II. The Corps sufficiently explained its mitigation decision.

While NEPA does not require mitigation, the Clean Water Act (together with its regulations and guidelines) may require compensatory mitigation for some permits. Section 404 of the Clean Water Act authorizes the Corps to issue permits allowing the "discharge of dredged or fill materials into . . . navigable waters." 33 U.S.C. § 1344(a). The governing regulations allow the Corps to require "compensatory mitigation" to "offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by" such permits. 33 C.F.R. § 332.3(a)(1); *see also id.* § 320.4(r). The Corps'

Section 404(b)(1) guidelines specify when such compensatory mitigation is required. *See* 40 C.F.R. § 230.93; *see generally* 40 C.F.R. Part 230. The purpose of compensatory mitigation is to "replace functional losses to aquatic resources, including wetlands"; unlike NEPA, these regulations do not address broader effects on the environment. *See* 33 C.F.R. § 332.3(a)(1) (requiring mitigation to compensate "for the aquatic resource functions that will be lost as a result of the permitted activity").

Here, the Corps analyzed Bayou Bridge's proposal to ensure that it would, first, avoid potential effects to wetlands; for example, Bayou Bridge agreed to narrow its limited permanent right-of-way from 30 feet to 15 feet to avoid some impacts to wetlands. ROA.1746-47. Then Bayou Bridge further reduced the impacts of the pipeline by, for example, co-locating it with existing utilities through most of the forested areas and by using "horizontal directional drilling" to cross some waters. ROA.1767-68.

The Corps then analyzed the impact of the revised project on wetlands. ROA.1757-62; ROA.1585-87, 1618-22, 1683-84. The Corps found that the entire pipeline would involve the discharge of dredge or fill materials into about 597 acres of wetlands. ROA.1775. Most of those impacts—about 455 acres—would be temporary. *Id*. The rest would be what are called "conversion" impacts; that is, about 142 acres would be permanently "converted" from one type of wetland to another—here, from forested wetlands to herbaceous "scrub shrub" wetlands. *Id*. (Herbaceous wetlands also provide important aquatic functions. ROA.1761.) The authorized discharges

for this project do not involve permanently filling wetlands to create new (dry) land, and the Corps concluded that it would not result in *any* permanent loss of wetlands. ROA.1775.

At the center of this litigation, and perhaps of greatest importance to Basinkeeper, the Corps found that discharges during the construction of this pipeline would potentially impact bald cypress/tupelo swamp. ROA.1779-81. Bald cypress/tupelo swamp is one of the specific categories of wetlands that the Corps' New Orleans District uses to analyze the potential effects of all projects in Louisiana. *See, generally*, LRAM Manual ("Exhibit 1") at 6–9, 14–15.[1] These wetland habitat types have been defined by the state's Natural Heritage Program. *Id.* at 6.

The Corps describes bald cypress/tupelo swamp as a "forested, alluvial swamp[] growing on intermittently exposed soils" whose "soils are inundated or saturated by surface water or ground water on a nearly permanent basis

[1] We attach a copy of the LRAM Manual to this brief as Exhibit 1. The LRAM Manual explains the LRAM and how it works in detail. The LRAM Manual was not submitted to the district court, but it is a publicly-available government document, so this Court may take judicial notice of its existence. *See* Louisiana Wetland Rapid Assessment Method for Use Within the Boundaries of the New Orleans District, Interim Version 1.0 ("LRAM Manual"), *available at* http://www.mvn.usace.army.mil/Portals/56/docs/regulatory/Mitigation/Louisiana_Rapid_Assessment_Method_2_26_16.pdf.

The Section 404 environmental assessment explains that LRAM has been subject to public comment during its development. ROA.1736-37. At a minimum, the LRAM shows that the Corps could have provided additional explanation if the district court had allowed additional briefing and a more fulsome development of the record than was possible on the extremely expedited schedule imposed by the court at the preliminary injunction stage. Similarly, the Section 404 environmental assessment also refers to the more detailed calculations set out in the final "Compensatory Mitigation Plan" for the project, *see*, *e.g.*, ROA.1777, which was also not included in the materials provided to the district court at the preliminary injunction stage and which provides further explanation of the Corps' work.

throughout the growing season except during periods of extreme drought." *Id.* It is one kind of "palustrine forested wetland" ("PFO") and differs from other palustrine forested wetlands by the specific species of trees that cover it, namely, bald cypress and tupelo gum trees. *Id.* at 14. The Clean Water Act (together with its regulations and guidelines) focus on the aquatic resource functions of wetlands, and do not give any special preference to bald cypress/tupelo swamp over any other kind of wetlands. *See* ROA.1759-60 (discussing functions of freshwater wetland habitats composed of bottomland hardwoods and cypress).

Most of the impacts of the discharges from the construction of this pipeline on bald cypress/tupelo swamp will be temporary. ROA.1775. But the Corps did find that these discharges will permanently convert about 78 acres of bald cypress/tupelo swamp (designated "PFO2") to herbaceous wetlands. ROA.1776.

The Corps required Bayou Bridge to purchase about 715 acres of wetlands from "mitigation banks" to offset the (mostly temporary) "unavoidable impacts to wetlands that would result from permit issuance." ROA.1777. The Corps' compensatory-mitigation regulations explicitly authorize the use of mitigation banks for such permitted impacts. 33 C.F.R. § 332.3(b)(2) (providing that a "permittee's compensatory mitigation requirements may be met by securing" credits from "an approved mitigation bank."). In fact, the Corps' regulations favor the use of mitigation banks over "permittee-responsible mitigation," like Basinkeeper's proposal to have Bayou

Bridge tear down old spoil banks, because mitigation banks "typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning, and implementation than permittee-responsible mitigation." *Id.* All mitigation banks—including the mitigation banks at issue in this case—are vetted by an interagency review team and subject to public comment before their use is approved. ROA.1736. As part of that public process for approving a mitigation bank, the Corps considers and approves the proposed service area for the mitigation bank, ensuring up front that the improvements that will be made by the bank will compensate for losses within the entire service area of the bank. *Id.*

As part of the mitigation plan at issue here, the Corps required Bayou Bridge to purchase about 138 acres of bald cypress/tupelo swamp from mitigation banks. ROA.1777, 1779. This alone would more than offset the permanent conversion of about 78 acres of bald cypress/tupelo swamp to herbaceous wetlands. But it was not enough to offset all of the temporary effects of the project on bald cypress/tupelo swamp. Unfortunately, no additional acres of bald cypress/tupelo swamp were available for purchase from mitigation banks in the relevant watersheds. ROA.1777-78. Consequently, the Corps allowed Bayou Bridge to compensate for the remaining temporary effects by purchasing about 200 acres of other palustrine forested wetlands (namely, bottomland hardwoods). ROA.1777, 1780.

The Corps explicitly acknowledged this issue in its Section 404 environmental assessment, *id.*, and its regulations authorize such "out-of-kind"

compensatory mitigation, 33 C.F.R. § 332.3(e)(2). The environmental assessment also explained that the Corps used the LRAM to determine how many and which types of credits Bayou Bridge had to purchase in order to offset the impacts of its construction of the pipeline to the aquatic functions of the wetlands. ROA.1736, 1777–82.

Finally, the Corps concluded that Bayou Bridge had purchased "[a]ppropriate compensatory mitigation . . . at these [mitigation] banks to offset unavoidable impacts to wetlands that would result from" the issuance of this permit. ROA.1777. The Corps found that "the total . . . credits actually purchased by" Bayou Bridge from mitigation banks "meets or exceeds what is required based on the project's impacts." ROA.1779. The Corps set out a summary of the calculations supporting those conclusions in a table. ROA.1780-81. Importantly, this compensatory mitigation was not required to comply with NEPA, or to support a "mitigated" FONSI, but rather to comply with the Clean Water Act (together with its regulations and guidelines).

The Corps' reasoning—and its documentation of its reasoning—should have been sufficient to withstand judicial review. But instead, the district court wrongly held that

- the Corps had offered no "rational explanation as to how the mitigation choices serve the stated goal of 'replac[ing] lost [aquatic] functions and services," ROA.4034-35;
- the Corps had done "no analysis or consideration . . . of whether a 'preference' for mitigation bank credits was appropriate," ROA.4035;

- the Corps had done "no analysis or consideration . . . of . . . whether the particular mitigation bank credits to be acquired are 'located where it is most likely to successfully replace lost functions and services,'" ROA.4035;
- the Corps had done "no analysis explaining how out-of-kind mitigation addresses [aquatic] functions," ROA.4038;
- "there is not an iota of discussion, analysis, or explanation how [bottomland hardwood] credits mitigate the loss of function and value of the cypress/tupelo swamp impact," ROA.4040; and
- "142 acres of wetlands . . . will be . . . irretrievably lost," ROA.4039.

On the basis of these erroneous findings, the district court held that the Corps' analysis of the mitigation measures was "arbitrary and capricious." But as shown below, the Corps weighed all of these issues and reached rational conclusions that are supported by the record (even the limited record that was before the district court).

Most of the analysis that the district court missed is already "baked in" to the tool that the Corps uses to assess compensatory mitigation in these Louisiana watersheds—the LRAM.[2] The Corps built the LRAM using the best available scientific information and input from the public. *See* Exh. 1 at 47–51; ROA.1736; *see also, e.g.,* ROA.1120–25 (public comments submitted by

[2] Like the LRAM Manual, the LRAM itself is available to the public (as a Microsoft Excel spreadsheet) on the Corps' website. And because the LRAM is an electronic spreadsheet, any member of the public may inspect the values that it assigns to different wetlands and the mechanisms that it uses to calculate compensatory mitigation.

Basinkeeper on the LRAM). It addresses all types of wetlands found in Louisiana, including bald cypress/tupelo swamp and bottomland hardwoods. *Id*. at 6. It uses a "watershed" approach to ensure that mitigation projects are undertaken in the same watershed basin as the project whose impacts they are intended to mitigate. *Id.* at 10. The Corps' regulations encourage the Corps to use this kind of tool to determine compensatory mitigation. 33 C.F.R. § 332.3(f)(1). The Corps' use of the LRAM here is entitled to deference because this is the kind of scientific judgment that Congress has entrusted to the agency. *See Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377–78 (1989).

The LRAM assigns a numerical value to the wetlands impacted by the Corps' issuance of a permit. Importantly, that value measures not just the acreage affected, but how much the affected wetlands contribute to the aquatic functioning of the watershed. *See* Exh. 1 at 5 (noting that LRAM "infers functional and value output based on its ecological condition."). Indeed, that is the entire purpose of LRAM: it scores the "lost aquatic functions and services" of the affected wetlands and then identifies mitigation banks in the same watershed where credits can be bought to offset that loss.

LRAM scores the impact to the wetlands based on a series of factors, including (1) the number of "acres impacted"; (2) "wetland status" (that is, whether the affected wetlands are rare or difficult to replace); (3) "habitat condition" (whether the affected wetlands are pristine or, for example, overrun by invasive species); (4) "hydrologic condition" (how connected the affected

wetlands are to their watershed); (5) "negative influences" (whether the affected wetlands are suffering from negative human influences); and (6) "impact type" (whether the affected wetlands will be lost permanently, partially, or temporarily). *Id*. at 11. The Corps assesses these factors using field data. *Id.* at 13.

Once LRAM has scored the impacts to the affected wetlands, it then identifies a total amount of "credits" that should be bought from approved mitigation banks in the same watershed basin to offset those impacts. The LRAM also includes information on all of the approved wetlands mitigation banks in Louisiana. The benefits of these mitigation banks are determined "by quantifying the aquatic resource restored, established, enhanced, and/or preserved." *Id.* at 34–35. The LRAM generally requires much more compensatory mitigation than other methods, such as the old "an acre for an acre" approach. Through this approach, the LRAM ensures that the higher the quality of the wetlands affected by the project—and the greater their aquatic functions—the more credits that must be purchased from mitigation banks to offset the impact.

The Corps used the LRAM to calculate the compensatory mitigation required to offset the discharges of dredge and fill caused by the construction of the pipeline here. ROA.1686-87, 1777. Table 1 of the Section 404 environmental assessment summarizes the results of the Corps' use of the LRAM. ROA.1779-80. That table identifies both the loss of aquatic functions as assessed by LRAM (in the form of "LRAM Credits Required") and the

acres purchased from mitigation banks (in the same watersheds) to offset that loss. ROA.1779-80. The Corps used this process for each and every acre of wetlands affected by the discharges that it authorized for the construction of this pipeline. The Corps' analysis and conclusions are described in its environmental assessments, and much more detail will be provided in the administrative record (which could not be compiled and put before the district court given the very short deadlines that the court set for the hearing on the motion for a preliminary injunction). *See generally* ROA.1686-88, 1777-81.

In total, the Corps found that this project will affect about 597 acres of wetlands (about 455 acres temporarily and about 142 acres permanently converted to herbaceous wetlands). ROA.1775. Using LRAM, the Corps calculated that Bayou Bridge had to purchase a total of about 715 acres of wetlands from mitigation banks in order to offset those impacts on the aquatic functions and services of the affected wetlands. ROA.1777.

It is true that a small amount of this mitigation was "out of kind"; that is, the Corps allowed Bayou Bridge to offset impacts to one kind of palustrine forested wetlands by purchasing palustrine forested wetlands consisting of a different species of trees. Specifically, the discharges authorized for the construction of this pipeline will impact bald cypress/tupelo swamp. ROA.1775. Most of those impacts will be temporary (about 160 acres), but some of those wetlands will be permanently converted from forested wetlands to herbaceous wetlands. *Id*. The Corps required Bayou Bridge to purchase about 138 acres of bald cypress/tupelo swamp from mitigation banks to offset

these effects. ROA.1779. That more than compensates for the bald cypress/tupelo swamp that will be permanently converted to scrub shrub wetlands. In fact, Bayou Bridge bought all of the acres of bald cypress/tupelo swamp available from relevant mitigation banks. But there were not enough acres in two of the watersheds to offset all of the temporary effects, and so the Corps allowed Bayou Bridge to purchase about 197 acres of other out-of-kind wetlands (namely, bottomland hardwoods) to offset the remaining temporary effects. ROA.1779-80.

This use of out-of-kind mitigation seems to have troubled the district court, but it was entirely appropriate. The Corps' regulations authorize the use of out-of-kind mitigation when it "will serve the aquatic resource needs of the watershed." 33 C.F.R. § 332.3(e)(2). Moreover, while Basinkeeper and its members may value the aesthetics of cypress trees over the oaks and dogwoods that make up the bottomland hardwoods, the Clean Water Act (together with its regulations and guidelines) does not. Instead, it focuses exclusively on the aquatic functions and services provided by these wetlands. From that perspective, bald cypress/tupelo swamp and bottomland hardwoods are similar; both are palustrine forested wetlands and both serve similar aquatic functions. *See* ROA.1759-61. They differ mainly in that they consist of different species of trees.

Thus, the Corps turned to out-of-kind mitigation here because Bayou Bridge had already bought all of the available acres of bald cypress/tupelo swamp in the mitigation banks in the relevant watersheds. ROA.1777-78

(explaining that "there were not enough in-kind credits to offset the project's impacts to [bald cypress/tupelo swamp] wetlands within both the Atchafalaya River and Terrabonne Basins."). And the Corps then used LRAM to ensure that this out-of-kind mitigation would be sufficient to offset the remaining temporary effects to bald cypress/tupelo swamp.

After carefully walking through the Corps' analysis, it is not difficult to refute the district court's findings against the Corps:

- The district court held that the Corps offered no "rational explanation as to how the mitigation choices serve the stated goal of 'replac[ing] lost [aquatic] functions and services," ROA.4034-35, but that is exactly what the Corps did with LRAM: it scored all of the acres of affected wetlands by the value of their "lost aquatic functions and services" and then required Bayou Bridge to make up for those lost aquatic functions and services by buying an equivalent amount of credits from approved mitigation banks.
- The district court held that the Corps did "no analysis or consideration . . . of whether a 'preference' for mitigation bank credits was appropriate," ROA.4035, but that preference is set out in the Corps' lawful (and unchallenged) compensatory-mitigation regulations, which explain that mitigation banks are preferred because they "typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning, and implementation than permittee-responsible mitigation." 33 C.F.R. § 332.3(b)(2). Notably,

those regulations also explain that mitigation banks are much preferred over "permittee-responsible mitigation" like Basinkeeper's untested scheme to have Bayou Bridge tear down old spoil banks (itself, an out-of-kind form of mitigation). *Id*.

- The district court held that the Corps failed to consider whether these "particular mitigation bank credits . . . are 'located where it is most likely to successfully replace lost functions and services,'" ROA.4035, but that is exactly what the Corps' mitigation bank approval process does: it ensures that the improvement projects to be undertaken by the bank will mitigate effects in the bank's defined service area.
- The district court held that the Corps did "no analysis explaining how out-of-kind mitigation addresses [aquatic] functions," ROA.4038, but again LRAM scores both the wetlands impacted by the issuance of the permit and the wetlands to be purchased as mitigation (including out-of-kind wetlands) based on their aquatic functions to ensure that the impacts of the project will be offset. And as discussed above, bald cypress/tupelo swamp and bottomland hardwoods are both palustrine forested wetlands that serve similar aquatic functions.
- Similarly, the district court held that "there is not an iota of discussion, analysis, or explanation how [bottomland hardwoods] credits mitigate the loss of function and value of the cypress/tupelo swamp impact." ROA.4040. But again, that is exactly the analysis that the Corps undertook using LRAM for each and every acre of bald cypress/tupelo

swamp habitat impacted by discharges authorized for the construction of the pipeline.

- Finally, the district court held that "142 acres of wetlands . . . will be . . . irretrievably lost," ROA.4039. This is simply untrue; no wetlands will be permanently filled by this project.

The district court reached the wrong conclusions here because it failed to understand the tool—the LRAM—that the Corps used to analyze these issues and to ensure that this mitigation will be effective.[3] The discussion set out above, moreover, is not a "post-hoc rationalization." To the contrary, it is based entirely on the record that was before the district court (most importantly, the Corps' environmental assessments), together with a handful of publicly-available documents (such as the LRAM manual and the Corps' compensatory-mitigation regulations). The Corps' "path" here "may reasonably be discerned" and so the Corps' action should have been upheld by the district court. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (internal quotation marks omitted).

For all these reasons, the district court abused its discretion in concluding that Basinkeeper was likely to succeed on the merits of its claim regarding mitigation.

[3] Basinkeeper may now argue that the LRAM is defective and that the Corps' conclusions are thus "arbitrary and capricious." But that issue is not before this Court at this time because the district court, having found that the Corps failed to explain itself at all, never reached the merits of the Corps' decision. If Basinkeeper wishes to challenge the LRAM or the Corps' application of the LRAM here, it will have to wait until those issues are first adjudicated by the district court.

III. The district court also misunderstood the Corps' analysis of the cumulative impacts.

NEPA requires agencies to consider the "cumulative impacts" of their actions (and the actions that they permit). 40 C.F.R. § 1508.7. A cumulative impact is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." *Id*. By requiring agencies to consider cumulative impacts, NEPA ensures that a series of "individually minor" actions will not cause a "collectively significant" impact over time that escapes NEPA review. *Id*. Notably, while NEPA requires agencies to consider the cumulative impacts of their actions, it does not require them to mitigate cumulative impacts.

The Corps analyzed the cumulative effects of the discharges authorized for the construction of the pipeline on other past, present, and reasonably-foreseeable future actions. ROA.1678-86, 1762, 1770-76. Those other actions included, for example, the dredging of a 2,000-foot long barge channel, a swamp restoration project, the installation of a pumping station to prevent flooding during storms, and the construction of a propylene pipeline. ROA.1680-81. Importantly, the Corps also considered the effects of other nearby pipelines that have been installed in this area over the past 50 years. ROA.1680. When it authorized the discharges necessary for the construction of this pipeline, the Corps concluded that because of "efforts taken to avoid and minimize effects on the project site wetlands and the mandatory implementation of a mitigation plan that functionally compensates

unavoidable remaining impacts," the issuance of these permits "will not result in substantial . . . cumulative adverse impact on the aquatic environment." ROA.1762.[4]

Basinkeeper maintains that old spoil banks—allegedly left over from the digging of old pipeline channels—have harmed the hydrology of the Atchafalaya Basin, and it has urged the Corps to require Bayou Bridge to remove those spoil banks as part of its mitigation plan. *See* ROA.4030. The facts surrounding the creation of these old spoil banks are disputed by the parties, and the Corps has required Bayou Bridge (in the special conditions of its permit) to avoid the creation of any new spoil banks when it undertakes the activities authorized by the permit.

The Corps explored with Bayou Bridge the possibility of removing the old spoil banks. But there are significant practical problems with Basinkeeper's proposal, and it is far from clear whether the watersheds would actually benefit from it: Basinkeeper's proposal has not been subjected to the kind of "rigorous scientific and technical analysis" that the regulations require to ensure that it would "restore an outstanding resource." ROA.6082-84; 33 C.F.R. § 332.3(b)(2). In any event, the Corps' regulations disfavor this kind of

[4] *See also* ROA.1685 ("Due to the mitigation requirement, the abundance of wetland habitat within the cumulative impact area . . . , and the lack of any proposed fill by the requester's preferred alternative, cumulative impacts on wetlands in the requester's preferred alternative area would be negligible."); ROA.1762 ("It is anticipated that through the efforts taken to avoid and minimize the effects on the project site wetlands and the mandatory implementation of a mitigation plan that functionally compensates unavoidable remaining impacts, permit issuance will not result in substantial . . . cumulative adverse impact on the aquatic environment.").

"permittee-responsible mitigation," which is "generally less likely to be a successful source of compensatory mitigation," favoring instead the mitigation banks on which the Corps relied here. 33 C.F.R. §§ 332.3(b)(2), (4); U.S. Army Corps of Engineers, Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19594, 19606 (Apr. 10, 2008). Ironically, Basinkeeper's proposal would not only require the out-of-kind mitigation to which it now strenuously objects, but it would also rely on Bayou Bridge—which specializes in transporting oil, not rebuilding wetlands—to perform this novel and untested mitigation.

The district court did not take Basinkeeper up on its proposal to force Bayou Bridge to tear down old spoil banks. The court did, however, hold that the Corps had failed to fully consider the cumulative effects of its permit in light of these old spoil banks, and it accused the Corps of taking the "myopic view" that it was "only required to consider the impacts of this singular project." ROA.4048.

This holding and accusation are not supported by the record. The Corps did consider the cumulative effects of the authorized discharges, as documented above. But the Corps rationally concluded that those discharges will not have cumulative effects because their impacts will be mitigated. ROA.1762. Because the authorized discharges will be mitigated, they will not have an *incremental impact*, and therefore cannot have any *cumulative impact*. *See* 40 C.F.R. § 1508.7 (defining cumulative impact as "the impact . . . which results from the *incremental impact* of the action when added to other past,

present, and reasonably foreseeable future actions.") (emphasis added). That is, because the impacts here are mitigated, they cannot contribute to a "collectively significant" impact over time. *See, e.g., Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1140 (9th Cir. 2006) (holding that an agency was not required to produce a "detailed cataloguing of past project's impact" on salinity where the proposed action would "have virtually no effect on salinity," and thus such a "catalog" would not inform the agency's analysis of the current project).

Ultimately, the district court's holding on cumulative impacts is built on its conclusion that the Corps did not ensure that the mitigation plan would offset the impacts of this permit. ROA.4048. And because the district court was wrong about the mitigation plan, its holding on cumulative effects is also an abuse of discretion and should be reversed.

IV. The district court's finding of "irreparable harm" is built on its other erroneous findings, and its injunction is overbroad.

The Supreme Court held in *Winter v. NRDC,* 555 U.S. at 20, that a court may grant a preliminary injunction only where the plaintiffs have shown a likelihood of irreparable harm. The district court's finding of irreparable harm here was based, in part, on its conclusion that this project "potentially threatens the hydrology of the Basin and poses the threat of destruction of already diminishing wetlands." ROA.4013-14. But those findings were made in error and, without them, the primary basis for the district court's injunction

disappears. As such, the district court's grant of the injunction was an abuse of discretion and should be reversed.

Because the Corps' detailed calculations show that the issuance of this permit will not have any unmitigated adverse effects on aquatic functions, the district court also gave short shrift to the other public interest considerations here. Notably, the Corps' approval of the permit serves an important public interest in the development of domestic energy resources, which weighs against the grant of injunctive relief. *See NRDC v. Kempthorne*, 525 F. Supp. 2d 115, 127 (D.D.C. 2007) (denying preliminary injunctive relief, in part because of the harm to the development of domestic energy resources); *N. Slope Borough v. Andrus*, 642 F.2d 589, 594 (D.C. Cir. 1980) (denying injunctive relief after considering the "dual public interests of protecting the environment and enhancing oil-production capacity").

The district court enjoined both the Corps and Bayou Bridge "from taking any further action on the project within the Atchafalaya Basin." ROA.4057. But this broad injunction will not only stop the construction activities that the district court thought might cause irreparable harm; it might also be read to prevent the Corps from taking administrative actions—such as processing modifications to Bayou Bridge's permits to accommodate minor routing changes—that cannot conceivably cause any harm by themselves. The district court abused its discretion by failing to narrowly tailor its injunction to prevent the irreparable harm that it found.

Finally, as we have explained above, the Corps' action here should have been upheld because its reasoning is clear on the face of its environmental assessments, and the district court would have seen that if it had fully understood the role of the LRAM. But even if the district court's adverse findings against the Corps were correct, it still should not have enjoined construction in the Atchafalaya Basin because it only found that the Corps had failed to *explain* itself sufficiently well. It does not follow from that lack of explanation that the issuance of this permit will cause unmitigated adverse impacts to wetlands and that construction should be enjoined. Instead of enjoining the Corps, the district court should have remanded these questions back to the agency for further explanation (which the Corps could have readily provided), or waited for the compilation of the full administrative record (which was, of course, not possible on the expedited schedule set for this motion). Either way, the district court would have received the additional explanation that it sought without enjoining a project that it otherwise concluded was lawful.

Conclusion

The district court's grant of a preliminary injunction should be reversed.

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Certificate of Service

I hereby certify that on April 2, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, which will serve the brief on the other participants in this case.

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Certificate of Compliance with Length Limits, Typeface Requirements, and Type-Style Requirements

1. This brief complies with the length limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(1) because it contains 7,758 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32.2.

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I hereby certify that on this 2nd day of April, 2018, the foregoing brief was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit through the Court's CM/ECF document filing system. I further certify that: (1) required privacy redactions have been made pursuant to this Court's Rule 25.2.13, (2) the electronic submission is an exact copy of the paper document pursuant to this Court's Rule 25.2.1, and (3) the document has been scanned with Windows Defender Security Center, version 1.263.1955.0, and is free of viruses.

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