

**He IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

ST. JOHNS RIVERKEEPER, INC.
Plaintiff,

Case No.: 3:17-cv-398-MMH-MCR

v.

**UNITED STATES ARMY CORPS OF
ENGINEERS,**
Defendant.

v.

JACKSONVILLE PORT AUTHORITY,
Intervenor.

**PLAINTIFF'S COMBINED MOTION FOR SUMMARY JUDGMENT AND TO
SUPPLEMENT THE RECORD AND INCORPORATED MEMORANDUM OF LAW**

Plaintiff, St. Johns Riverkeeper, Inc., pursuant to Rule 56, Federal Rules of Civil Procedure and Middle District Local Rule 3.01, files this Motion for Summary Judgment and to Supplement the Record and Incorporated Memorandum of Law.

I.

A. MOTION FOR SUMMARY JUDGMENT AND TO SUPPLEMENT RECORD

St. Johns Riverkeeper, Inc. moves for summary judgment on its claims that defendant ACOE violated NEPA. In accordance with the court's order, Riverkeeper includes its arguments to supplement the Record. Summary judgment is warranted because there is no genuine issue of material fact and Riverkeeper is entitled to judgment as a matter of law because the Corps has failed to comply with NEPA.

1. Count III: Failure to Consider the Environmental Consequences. NEPA requires that agencies consider the cumulative environmental impact of past actions on

the affected area. The Corps failed to quantify or consider the cumulative impacts that past river deepenings have had on the River's salinity regime and on water levels/flooding risk.

2. Count IV. In light of the Corps' failure to consider the cumulative dredging-related impacts on salinity the Corps has not proposed adequate mitigation.

3. Count II. The flooding impacts arising from Hurricane Irma require a new circumstances Supplemental Environmental Impact Statement.

WHEREFORE, the Riverkeeper moves this court for an order granting it summary judgment finding that the Corps has failed to comply with NEPA, to remand to the Corps for compliance with NEPA, and to enter an injunction prohibiting the Corps and JaxPort from continuing with dredging any portion of the St. Johns River until such time as NEPA compliance is achieved.

B. Motion to Include Additional Information in the Record

In accordance with the Court's Order, [Doc. 56], Riverkeeper moves to include in the Record the Army Corps of Engineers, Phase II Storm Surge Analysis, Post 45 Project, Charleston, SC October 21, 2016 ("Charleston Analysis"). [Doc 57-1]. In addition, Riverkeeper also moves to include a Corps of Engineers study, previously unknown to it, titled Archival Water-Level Measurements: Recovering Historical Data to Help Design for the Future ("Water Level" study). These documents will assist the court in determining whether information has been overlooked by the Corps and to provide understanding of technical scientific information.

The Water Level study is filed herewith as Exhibit "A". Arguments for inclusion of both documents are incorporated into the supporting Memorandum of Law.

Rule 3.01(g) Compliance

Counsel for the Corps and JaxPort have advised they object to the inclusion of the August 2017, Corps of Engineers Water Level Study.

Standing

While Defendants did not contest Riverkeeper's standing in response to the Motion for Temporary Injunction, Riverkeeper nevertheless incorporates its standing arguments, facts and affidavits in its temporary injunction motion. [Doc. 24].

Procedural Posture of the Case

On November 3, 2017, the Riverkeeper filed an Amended Complaint adding a claim that dredging-induced flooding, highlighted by Hurricane Irma. [Doc. 21]. The Riverkeeper filed a Motion for Temporary Injunction on December 4, 2018. [Doc. 24], which was denied on January 19, 2018. [Doc. 42].

On March 23, 2018, Riverkeeper moved to supplement the record. [Doc. 51]. By Order dated November 27, 2018, this Court granted Riverkeeper's motion, in part, and denied it in part, without prejudice to argue for inclusion of the document in its motion for summary judgment.

Due to the federal government shut down in January 2019, an unopposed motion for stay was granted. The case was stayed and remained so until June 25, 2019. [Docs. 62, 67].

II. MEMORANDUM OF LAW IN SUPPORT OF MOTIONS

The Requirements of NEPA

Two purposes underlie the National Environmental Policy Act's ("NEPA's") Environmental Impact Statement ("EIS") requirement. First, the EIS process is intended

to ensure that “the agency, in reaching its decision will have available, and will carefully consider, detailed information concerning significant environmental

impacts....” Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

Second, “it also guarantees that the relevant information will be made available to the larger audience that may also play a role both in the decision-making process and the implementation of that decision.” Id. The NEPA process requires that the Corps take a “hard look” at the environmental consequences that flow from a particular action.

Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97, 103 S.Ct. 2246 (1998). The process does not mandate substantive requirements. 490 U.S. at 350.

Rather, the purpose of the “hard look” is to ensure that the “agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious.” 462 U.S. at 97. Agencies have an implicit duty to adequately identify and evaluate negative environmental effects. National Audubon Society v. Dep’t of Navy, 422 F.3d 174, 194 (4th Cir. 2005). A “hard look” should include: “neither researching in a cursory manner nor sweeping negative evidence under a rug.” Id.

NEPA requires a “cumulative impacts analysis,” which includes the impacts of relevant past actions, including both direct and indirect effects. 40 C.F.R. § 1508.7. Pursuant to Council on Environmental Quality (“CEQ”) guidance,¹ agencies can generally focus on the current aggregate effects of past actions without delving into the historical details of individual past actions. Guidance at 1-2. However, this discretion coincides with the agencies’ obligation to provide “a concise description of the

¹ Available at https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/Guidance_on_CE.pdf.

identifiable present effects of past actions to the extent they are relevant and useful in analyzing whether the reasonably foreseeable effects of the agency's proposal for action . . . may have a continuing, additive and significant relationship to those effects." Guidance at 1 (emphasis added).

General statements about "possible" effects and "some risk" do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided. Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1075 (9th Cir. 2002). Without such information, "neither the courts nor the public . . . can be assured that the [agency] provided the hard look it is required to provide." Great Basin Resource Watch v. Bureau of Land Management, 844 F.3d 1095, 1105 (9th Cir. 2016) (agency failed to take hard look at cumulative impacts of certain air pollutants where baseline for those pollutants unjustifiably assumed that existing impact was zero).

The Standard of Review

NEPA claims are generally generally subject to the deferential arbitrary and capricious standard. Sierra Club v. Martin, 168 F.3d 1, 3 (11th Cir. 1999). However, the court "must overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself." Florida Wildlife Federation, 401 F.Supp.2nd at 1307, *quoting* Sierra Club v. Martin, 168 F.3d 1, 4 (11th Cir. 1999) (citation omitted). In fact, the court is "duty-bound to overturn such actions. Florida Wildlife Federation, 401F Supp.2nd at 1307, *citing* Sierra Club v. Martin, 168 F.3d 1, 4 (11th Cir. 1999) (citation omitted).

SUMMARY JUDGMENT ON COUNTS III, IV, AND II

I. THE CORPS FAILED TO CONDUCT A CUMULATIVE IMPACTS ANALYSIS THAT ADEQUATELY EXAMINES THE PRESENT, CONTINUING EFFECTS OF PAST DREDGING PROJECTS

A. The Corps Failed to Conduct a Cumulative Impacts Analysis That Adequately Examines the Present, Continuing Effects of Past Projects on the River's Freshwater Wetlands

Riverkeeper asserts that the Corps' analysis of present effects of past Corps' dredging projects on the River's freshwater wetlands was arbitrary and capricious because the Corps: 1) failed to justify its decision to describe the present effects of its past dredging projects as speculative; 2) failed to explain its omission of extensive areas of presently impacted tributary wetlands identified by its own wetlands experts which were previously included in the draft SEIS; and 3) failed to explain its rejection of a scientific methodology for identifying impacted wetlands developed by its own wetland experts which was used to identify such wetlands in the draft SEIS. Since the sufficiency of the Corps' cumulative impacts analysis on wetlands is necessarily dependent on an adequate assessment of present, continuing effects of past actions, the Corps' cumulative impacts analysis is also insufficient.

1. Background

The supplemental EIS under review is intended to update the General Reevaluation Reports and the accompanying NEPA reviews of the past two Lower St. Johns River ("LSJR") dredging projects – completed in 2003 and 2010 – which resulted in a significant deepening of the first 20 miles of river channel. [AR 323606 at 323875;

AR 250494 at 250495].² NEPA reviews for both projects projected insignificant impacts to River salinity levels. [AR 000193 (1998 EIS); AR 001513 at 001611 (2002 EA)].

During the NEPA review for the current project, which will deepen the first 13 miles of the River from 40 feet to 47 feet, alterations to the River's salinity regime and its associated impacts to natural resources, particularly freshwater wetlands and Submerged Aquatic Vegetation ("SAV"), was a primary and continuing area of controversy. [AR 323606 at 323615 & 323734]. Salinity levels are the primary factor affecting the ecology of the LSJR. *Id.* at 323649. Increases in the levels and/or duration of salinity can profoundly alter the vegetative composition, soils, and habitat function of wetland systems, *Id.* at 323649-50, and can slow the growth, stop the growth, and eventually kill-off SAV. [AR 327166 at 327783]. The concerns were well-founded. In the FSEIS, the Corps acknowledges that deepening the river channel results in upstream movement of saline water, and that this movement causes and has caused unavoidable adverse impacts to LSJR wetlands and SAV.

The primary unavoidable adverse impact of the project alternatives is alteration of the salinity regime in the LSJR. The deepened channel will result in the movement of higher saline water farther upstream. The magnitude of upstream movement increases with increase in project depth. The change in salinity will shift the northern boundary of SAV upstream, and allow salt tolerant marsh vegetation and estuarine flora and fauna to move farther upstream. [AR 323606 at 323883].

Both the St. Johns River Water Management District³ ("District") and Riverkeeper repeatedly registered concerns about salinity impacts caused by past dredging projects.

² Citation to the Administrative Record will be in the format: "AR" followed by the first page of the document cited (which is its index number) followed by the specific page referenced.

³ The District requested data regarding "historic salinity encroachments" caused by past projects, at the inception of the NEPA process in 2007, [AR 008613 at 008614] and again in 2009. [AR 313426].

Riverkeeper specifically requested a cumulative impact analysis that fully examined the extent of these presently existing impacts and requested their mitigation:

Previous dredging and navigational changes to the St. Johns River have progressively increased the salinity levels, degraded water quality and accelerated shoreline erosion. These unintended, long-term "cumulative impacts" have not been adequately considered in past studies. The USACE DSEIS must address cumulative impacts on the river system and potential mitigation options, not just the incremental difference between the existing channel and the proposed deeper channel. [AR 273905 at 273925] (Riverkeeper comments on DSEIS).⁴

The Corps' post-decisional response to these comments was that no data or analyses were available to assess how past deepening or other changes in the watershed may have affected salinity levels. [AR 328211 at 328232] (response to Riverkeeper comment after SEIS finalized); [AR 254717 at 254728] (response to Water Management District seven years after request).⁵

The FSEIS's cumulative impact section includes past LSJR dredging projects as actions relevant to its discussion of cumulative impacts to wetlands, but provides a very limited analysis of the present, continuing effects of those projects on LSJR wetlands:

These past deepening events *may* have already resulted in some upstream movement of salinity. An assessment of river shoreline wetlands within the project area indicate [sic] that salinity stress occurs upstream to approximately Black Creek, just upstream of Doctors Lake. The condition of the wetlands suggests that the stresses have occurred relatively recently (Courtney Hackney, Ph.D., personal communication, December 2012). [AR 323606 at 323875]. (Emphasis added).

The cumulative impact analysis for wetlands in the FSEIS is one sentence:

Exposure to increased salinity could further impact freshwater wetlands already responding to past channel deepening activities, changes in stormwater runoff patterns, and sea level rise. [AR 323606 at 323881].

⁴ Riverkeeper repeated its request in its comments on the FSEIS. [AR 299565 at 299566-67 and 299575].

⁵ The FSEIS does not acknowledge that these requests were made. [AR 323606 at 323734] (Public and Agency Concerns); 323895-97 (listing 41 areas of public and agency comment but not salinity impacts of past projects).

2. The Corps' Unjustified Decision to Limit the Scope of its Analysis of the Present Effects of Past Dredging Actions by Describing Them as Speculative Was Arbitrary and Capricious.

Under CEQ guidance, the Corps is given considerable discretion over the scope of its analysis of the present impacts of past actions; however, that discretion is bridled by the arbitrary and capricious standard. The Corps acknowledges that the magnitude of upstream movement of saline water in the LSJR “increases with increase in project depth,” [AR 323606 at 323883], yet describes the salinity effect of past dredging projects that increased channel depth as speculative (“these past deepening events *may* have already resulted in some upstream movement of salinity). [AR 323606 at 323875].

The analysis offers no justification for its description of the salinity effects of past projects as speculative. There is nothing in the FSEIS that supports this decision; nor is there evidence in the record of a decision-making process leading to this conclusion. Neither can the Corps rely on its post-decisional statement in the response to comments section of the final SEIS “that no data or analyses are available” to conduct an analysis of past projects’ salinity impacts. [AR 328211 at 328232] (response to Riverkeeper comment after SEIS finalized). Like post-hoc justifications for a decision offered by agency counsel, post-decisional responses to comments should not be used as the equivalent of contemporaneous evidence of the agency’s actual decision-making process. Colorado Environmental Coalition v. Salazar, 875 F. Supp.2d 1233, 1258 (D. Colo. 2012) (rejecting agency’s attempt to rely on post-decisional responses to comments as evidence of agency’s actual decision-making process into the significance of ozone precursor impacts); *cf.* Wilderness Watch v. Mainella, 375 F.3d 1085, 1094

(2004) (allowing agency to rely on post-hoc rationalization frustrates fundamental purpose of NEPA which is to ensure agency takes hard look at environmental consequences of their actions). Furthermore, record evidence conflicts with the Corps' post-decisional response. When the Florida Department of Environmental Protection ("FDEP") asked the Corps, as part of its review of the draft FSEIS, to use available data to examine salinity impacts of the 2010 deepening project, [AR 300199 at 300206], the Corps' in-house response was: "We did not look at data to detect changes due to the 2010 deepening. But we can look at that." [AR 300610-11].⁶ Nor did the Corps look for any correlation between "relatively recent" dredging projects in 2003 and 2010 and the "relatively recent" salinity stresses impacting LSJR wetlands. When FDEP asked the Corps for additional information concerning Dr. Hackney's observations regarding the recentness of the impacts, the Corps' response was: "the USACE does not have additional information." [AR 300493 at 300496].

The Corps' unjustified decision to describe the present and continuing salinity impacts of its past projects as speculative was arbitrary and capricious. Sierra Club v. Bosworth, 199 F.Supp.2d 971, 986-87 (N.D. Cal. 2002) (agency's assertion that past actions in part of a forest were no longer relevant because a fire had destroyed most if not all of the past projects' effects failed hard look standard because Service could not provide any citation to the record demonstrating the scientific basis for this assertion).

⁶ The email suggests that the modeling would be difficult but not impossible. [AR 300610.]

3. The Corps' Unexplained Decision to Omit Extensive Areas of Presently Impacted Tributary Wetlands Identified by Its Own Experts from Its Description of the Identifiable Present Effects of Past Dredging Projects was Arbitrary and Capricious.

CEQ guidance requires the Corps to provide a concise description of “the identifiable present effects of past actions.” While the Corps has considerable discretion over its description of these effects, that discretion is again bridled by the arbitrary and capricious standard. Here, the Corps offers no explanation for why it included a consultant’s cursory “assessment” of salinity impacted *riverine* wetlands derived from a one-day “limited field observation” in 2012, [AR 327166 at 327375 (describing assessment)], but omits extensive areas of similarly impacted *tributary* wetlands identified during the wetlands effects analysis conducted by a Corps assembled team of wetland experts⁷ in 2013. These impacted *tributary* wetlands were documented in the draft version of Appendix E (Wetlands Effects and Mitigation Report), [AR 216745], which accompanied the May 2013 draft SEIS.

According to the Draft Report, the wetlands were identified using a scientific methodology that allows identification of wetlands impacted by rising salinity levels. [Id. at 216754-55].⁸ After conducting numerous site visits,⁹ the experts used this methodology to identify extensive areas of tributary wetlands of the LSJR which, like the

⁷ The team assembled by the Corps consisted of employees from USACE, U.S. Environmental Protection Agency (EPA), (FWS), National Marine Fisheries Service (NMFS), Florida Department of Environmental Protection (FDEP), and Florida Fish and Wildlife Conservation Commission (FFWCC). [AR 216754 at 216574].

⁸ The methodology is based on the work of Dr. Courtney Hackney who is an acknowledged expert on the impacts of channel dredging and sea level rise on riverine and tributary wetlands. His work is relied upon in the FSEIS, {AR 323606 at 323852}, and it formed the basis for much of the Corps’ evaluation of the projected effects of the dredging project on wetlands. [AR 327166 at 327375-78] (modeling); 327829 (corrective action plan).

⁹ The Report notes that its findings were reached after “[n]umerous meetings and site visits were conducted to gain a consensus on the characterization of the wetland areas and effects related to the proposed project.” [AR 216745 at 216574].

riverine wetlands the consultant observed,¹⁰ were already evidencing significant adverse impacts due to rising salinity levels:

The main wetland effects would occur within the extensive tidal floodplain areas of the tributaries including the Ortega River, Julington Creek, Durbin Creek and Black Creek. *These systems are already experiencing the effects of salinity increases. . . . Id.* at 216770.

The Report also includes descriptions of the specific tributary wetlands already impacted by rising salinity levels.¹¹

However, after documenting the existence of these identifiable and quantifiable presently impacted wetlands, the Corps deleted both the description of the scientific methodology developed to identify these wetlands and all references to wetlands impacts caused by rising salinity levels, from the final version of Appendix E that accompanies the final SEIS. [AR 327166 at 327742]. As a result, neither the FSEIS nor the final Effects and Mitigation Report (Appendix E to the FSEIS) acknowledges the

¹⁰ The Corps' wetlands experts also observed wetlands located between river miles 44 to 50, along the St. Johns River main stem from Mile 44 to 50, that were *already being affected by rising salinities within the river*, and which would likely experience an acceleration of salinity effects due to the current project. [AR 216745 at 216771].

¹¹ Another area within Jacksonville that demonstrates the effects of increasing salinities and conversion to a transitional system is the wetland system at Goodby's Creek. This area displays a mixture of saltwater and freshwater vegetation, with invasion of *Spartina bakeri* occurring in the lower tidal portions of the site (Figure 4). [AR 216757-58].

The Ortega River floodplain wetland system is one of the most extensive within the Lower St. Johns River. The current transitional area within the Ortega River is perhaps the most representative among all major tributaries of the Lower St. Johns River, with numerous indicators of saltwater effects such as stunting and mortality of trees, invasion by salt tolerant vegetation, etc. [AR 216767].

The Trout River system has been highly altered by development as it is within a highly urbanized and industrial corridor. The area that was identified and scored is likely already being heavily influenced by higher salinity frequencies; however, due to a lack of modeling data within this area, it was still evaluated and scored to determine effects. [AR 216767].

The most upstream wetlands along Cedar Creek that still exhibit freshwater vegetation are likely exposed to higher levels of salinity and are likely already within a transitional zone based on the close proximity to downstream salt marsh. [AR 216768].

existence of riverine and tributary wetlands already impacted by rising salinity levels that were observed by the experts tasked with conducting the wetlands effects analysis.

Having selected their experts to conduct the wetlands effects analysis, the Corps was not free to rely on an earlier analysis while rejecting without explanation the more recent analysis prepared by their experts. See Conservation Law Foundation v. Federal Highway Admin., 630 F. Supp.2d 183, 209-10 (D. N.H. 2007) (agency erred when it relied exclusively on outdated population growth forecast to prepare traffic projections for highway project without accounting for its failure to rely on more recent population growth forecast commissioned by the agency). Similarly, having developed a methodology that can be used to identify wetlands presently impacted by rising salinity levels, and having employed that methodology in the draft EIS, the Corps was not free to reject the use of that analysis to conduct a presently existing effects' analysis without explanation. High Country Conservation Advocates v. U.S. Forest Service, 52 F. Supp.3d 1174, 1189-93 (D. Colo. 2014) (agency failed to adequately disclose effects of GHG emissions because "hard look" applies to method designed to quantify a project's contribution to climate change costs which agency used in draft EIS but removed from final EIS without adequate justification).

The Corps is obligated to disclose "the identifiable present effects of past actions." The Corps' sole reliance on the consultant's assessment, which results in the omission of extensive areas of presently impacted tributary wetlands, creates a highly misleading impression as to the nature and the extent of the present effects of past dredging projects. Omission of reliable information produced by the agency's own experts that casts doubt on the agency's statements regarding the nature and extent of salinity

impacts of past projects is significant. *Id.* at 213-14. The Corps' unexplained failure to disclose the findings of its own experts was arbitrary and capricious. National Audubon Society v. Dep't of Navy, 422 F.3d at 194 (agency fails to comply with its implicit duty to adequately identify and evaluate negative environmental effects where it relies on cursory research and sweeps its own negative findings under the rug).

4. The Corps Fails to Adequately Address the Cumulative Impacts of Past Dredging Projects on Wetlands

The sufficiency of the Corps' cumulative impacts analysis of effects on wetlands is necessarily dependent on an adequate assessment of present, continuing effects of past actions on wetlands. As explained *supra*, the Corps' conclusory disclosure of those impacts was inadequate and its omissions significant. Therefore, the Corps' cumulative impacts analysis, which fails to disclose the true additive effect of the current project when combined with the effects of past dredging projects is insufficient as well. Delaware Riverkeeper Network v. F.E.R.C., 753 F.3d 1304, 1319-20 (2014) (cumulative impact analysis of natural gasline upgrade project was deficient where agency had failed to properly assess the significance of prior relevant actions).

B. The Corps' Mitigation Plan is Inadequate

The sufficiency of the mitigation measures proffered in the FEIS are necessarily dependent on an adequate assessment of environmental impact. For this reason, the FEIS also fails to sufficiently address mitigation. Nat'l Audubon Soc'y v. Dep't of Navy, 422 F.3d 174, 200 (4th Cir. 2005). The Riverkeeper commented that mitigation options for the project must address cumulative impacts, and not just the impacts due to the proposed project. [AR 273905 at 273925]. Furthermore, the FSEIS specifically states that it is a *supplemental* EIS designed to update the General Re-evaluation Reports of

the two most recent deepening projects and their accompanying environmental reports – both of which determined that the deepening project at issue would have insignificant impacts on salinity. [AR 323606 at 323629-30; AR 000194] (1998 EIS); [AR 001513 at 001611] (2002 EA). Because no adverse impacts were projected, neither project mitigated for adverse impacts caused by increases in salinity. As explained supra, the NEPA process for this supplemental EIS has uncovered information evidencing that those projections of minimal salinity impacts were in error. Updating the prior reports requires updating the current project’s mitigation requirements to address the adverse impacts cause by these prior projects, once the Corps completes an adequate cumulative impacts investigation. See 40 C.F.R. § 1502.9(c)(1)(ii) (a primary purpose of a “supplemental” EIS is to discuss “significant new circumstances or information relevant to environmental concerns”).

C. Failure to Consider Cumulative Impacts of Water Levels and Flooding Violates NEPA

NEPA requires that cumulative impacts of past actions be evaluated in conjunction with new related projects. City of Oxford v. FAA, 428 F.3d at 1354 & n. 23 (11th Cir. 2005); Ohio Valley Env’l Coalition v. Hurst, 604 F.Supp.2nd 860, 88586 (S.D. W.V. 2009) (failure to consider the ongoing effects of past activities was error).

1. The FSEIS is Devoid of Any Consideration of Past Dredging Induced Water Level Increases

The Corps did not consider the cumulative impacts of past river dredging with regard to flooding, storm surge, or tides. The ten page cumulative impacts analysis for this project is contained in Section 7.13 of the FSEIS. [AR 323606 at 323873 – 323883]. Nowhere in it is there any analysis, discussion or even *any mention* of the

cumulative impacts of increased water levels, tides or flooding resulting from past dredging. Moreover, neither does the Storm Surge model or its appendices contain any cumulative effect calculations or analysis of the of past dredging-induced water level impacts. [AR 325435 at 326183-327125].

2. The Corps was Required to Evaluate Flooding Impacts and was Aware of its Obligation.

Executive Order 11988 requires Federal agencies, in any action subject to NEPA, to evaluate the potential effects of any actions it may take in a floodplain and “shall take action to reduce the risk of flood loss, to minimize the impact of floods.” Exec. Order No. 11988, 3 C.F.R. 1977 p. 117. This obligation was known to the Corps. At least as far back as April 2012, Corps modelers were aware they needed to evaluate the impact deepening of the river would have on “flooding.” [AR 098107 at 098107]. The need to evaluate flooding was not something that surprised the Corps as a result of Hurricane Irma.

3. The Corps Storm Surge Model Excluded Calculation and Analysis of the Cumulative Water Level Impacts of Past Dredging.

The Storm Surge model used only the existing river depths immediately before this project as its “baseline” from which it would determine if there would be any flooding impacts. Like salinity, channel deepening affects tide and storm surge water levels in the River. [AR 322856 at 322873]. The Storm Surge model used as a “baseline,” the 40-foot channel depth from the last dredging in 2010. [AR 325435 at 26100]. This excluded any water level increases that resulted from the past dredging from as shallow as 13 feet. In doing so, the Corps ignored the potential flooding impacts resulting from as much as 27 feet of past dredging. [AR 322856 at 322875]. The 7 feet of river

deepening the Corps analyzed thus ignored the cumulative impact of four times that amount of past deepening. This violates NEPA's requirement that the ongoing effects of past cumulative impacts be analyzed. Ohio Valley, 604 F.Supp.2nd at 885 (S.D. W.V. 2009). As the Ohio Valley court observed, the effects of past authorized destruction of streams does not exist in a vacuum and does not just go away when the earlier projects are completed. Ohio Valley, 604 F.Supp.2nd at 887. Similarly here, increased water levels resulting from past deepening efforts do not go away just because the earlier dredgings have been completed. Accordingly, the use of a "baseline" that ignores those ongoing effects violates NEPA. In Ohio Valley, the court addressed the Corps use of a baseline that ignored ongoing effects of past actions. It held that the accumulated impacts of those actions could not become a new "baseline from which future impacts are measured. 604 F.Supp.2nd at 887.

4. The Corps Chose the 40-foot Baseline to Avoid Evaluation of Flooding Impacts

The choice of the improper 40-foot baseline was made by the Corps' modelers to *avoid* evaluating the impact of dredging-induced flooding. In an email dated April 25, 2012, Corps modeler Bratos inquired of Russell Weeks, Chief of the Modeling Section:

[W]hat we are required to do related to flooding?"

Bratos further stated:

I would like to avoid going very much into the flooding issue.

In response, Modeling Chief Weeks told him to:

[O]nly look at the comparative storm surge heights generated by the Storm Surge model under the [without current project] and [with current project] conditions....

Weeks admitted that if storm surge heights were significantly altered:

[W]e would likely then have to consider the resultant flood impacts.

Weeks then added:

Hopefully, that will not be the case.

[AR 098107].

Consistent with the Bratos-Weeks desire to “avoid” flooding analysis, the Corps’ water level modeling excluded from review all prior deepening-induced water levels. No reason for this, other than the desire to avoid flood analysis, was provided by the Corps.

5. The Failure to Consider Cumulative Water Level Impacts of Past Dredging Violates NEPA

NEPA regulations require that cumulative impacts analysis include the *incremental* impact of the action “when added to other *past*, present and reasonably foreseeable future actions.” 40 C.F.R. §1508.7 (emphasis supplied). The purpose is to avoid “death by a thousand cuts.” To understand when there has been one cut too many, it is necessary to know what the effects of past dredging have been. Because the cumulative effects on water levels of past dredging was not calculated, it was not evaluated by the Corps or disclosed to the public. NEPA requires that the agency have available and consider information regarding significant environmental impacts and guarantees that relevant information will be made available to the public that may also play a role in the decision-making process and its implementation. City of Oxford, 428 F.3d at 1354 (citations omitted).

The Corps’ failure to consider the cumulative dredging-induced flooding impacts is not simply a NEPA procedural failure. Past river deepening has caused Wilmington, South Carolina and Albany, New York to suffer *doubled* tide levels and flood risk. [Water Level, p. 24-25]. In the instant case, information regarding cumulative flooding risk

impacts of past dredgings was not disseminated to the public and their reaction to past cumulative increases in flood risk is unknown. Moreover, the failure has real world adverse impacts due to Jacksonville's susceptibility to flooding from even small increases in water level. The Jacksonville area is "relatively flat" with a "low slope" such that "small increases" in water levels can affect a large area of the St. Johns River. [AR 322856 at 322877]. Some areas of Jacksonville now suffer repeated flooding simply from high tides or tides associated with normal storm events. Flooding will be aggravated by the dredging-caused increased tide and storm surge heights. [Doc. 24-1 ¶17]. Like Wilmington and Albany, Jacksonville may have already suffered a doubling of its flood risk as a result of past dredging. Indeed, this seems likely given the tidal flooding residents have been enduring. However, we do not know, because the Corps has failed to properly evaluate the cumulative impacts of the past dredging.

6. The Corps' Bald Assertion of No Flooding Does Not Cure its Failure to Calculate and Evaluate the Water Level Impacts of Past Dredging.

There was no consideration of the any flooding impacts in this case, cumulative or otherwise. The Corps asserted, without explanation, that deepening the river will not cause any "significant increase" in storm surge elevations. [AR 323606 at 323767]. The Corps then converted its not "significant" claim into an assertion that dredging will cause *no* flooding and no adverse impacts on flood plains saying:

There will be no induced flooding directly associated with this project. [AR 327166 at 327296]; and

This project would have no adverse impacts to flood plain management. [AR 323606 at 323890].

These two assertions are stand-alone statements in the FSEIS and were made without any explanation or elaboration.

Unsupported assertions, as the Corps made here, that the impacts will be small or nonexistent, are not sufficient to satisfy the required “hard look.” Province of Manitoba v. Salazar, 691 F.Supp.2nd 37, 47 (D.C. Cir. 2010). There the court held that by looking at the project in isolation and declaring the withdrawal too small to have impact without looking at existing withdrawals, was “a glance at the issue, not a “hard look.” Id. In the instant case, the bald assertions by the Corps do not even constitute a glance. This is especially true because even without considering past cumulative water level increases the Corps predicted storm surge increases from a 100-year storm to be between .25 feet (3 inches) and up to as high as .7 feet (8.4 inches). [AR 325435 at 326105-06].

Because the Corps failed to calculate, consider or disseminate the cumulative impacts of water level rise associated with past dredging, it failed to comply with the requirements of NEPA and this case must be remanded so that the Corps can undertake the appropriate analysis.

D. A Supplemental EIS is Required for Flooding from Hurricane Irma

NEPA requires “agencies to take a “hard look” at the environmental effects of their planned action, even after a proposal has received initial approval. Marsh v. Oregon Natural Resources Council, 490 U. S. 360, 374 (1989). The Supreme Court held that NEPA regulations impose a duty on all federal agencies to prepare an SEIS if significant new circumstances or information relevant to environmental concerns and bearing on the proposal or its impacts occur or if new significant impact information, criteria or circumstances relevant to environmental considerations impact on the recommended plan or proposed action. Marsh, 490 U. S. at 371, *citing*, 40 CFR §1502.9 (c) (1987). The flooding concerns highlighted by Irma constitute significant new information. This is

particularly true here in light of the Corps' failure to evaluate the flooding risk increase associated with past dredging.

The Corps, in its flooding Supplemental Environmental Assessment and Finding of No Significant Impact, ("FONSI") included a section purporting to address cumulative impacts. However, like the FSEIS, it is devoid of any analysis of the impact of past dredging on water levels. [AR 322856 at 322874-77]. Like the FSEIS, the Corps does list its past deepening of the river channel. [AR 322856 at 322834]. However, listing without analyzing impacts, is not sufficient. Great Basin, 844 F.3d 1095, 1105. As discussed, the Corps did not calculate, analyze or consider the impact of past dredging on increased water levels in the FSEIS. Nor did it do so in its FONSI, although it implies in its FONSI that cumulative impacts were evaluated in the Storm Surge model. [AR 322856 at 322876].

Irma's significance as new information goes beyond its historic flooding, its recency and the availability of quality data. It is exactly the type of storm that the Storm Surge model requires in order to correctly model extreme events. Irma caused such high water levels because it occurred in combination with a northeaster and higher than normal tides. [AR 322856 at 322868]. Combination events are those that produce higher water levels than just one storm alone, like when a hurricane produces flooding from both storm surge and river flooding. [Water Level, P. 38]. Hurricane Irma passed along the West Coast of Florida, just east of Tallahassee on September 11, 2017. Although Irma only produced sub-hurricane winds here, it still caused record flooding in Jacksonville because Irma was a combination event in that water levels from Irma were increased by a northeaster that hit a few days before. [AR 322856 at 322868].

The Storm Surge model requires use of the two storms with the highest water levels to correctly model “extreme events.” [AR 325435 at 326147]. The Corps admits that it used Hurricane Frances instead of Hurricane Jeanne--even though Jeanne produced water levels nearly 2 feet higher. [AR 326147 at 326150]. It did so because Jeanne, like Irma, was a combination event--and the Corps did not want to bother including the impacts of the related storm. [AR. 325435 at 326147]. Yet, the Corps’ Water Level Study warns that failure to use appropriate data may cause the model to miss combination events and produce unrealistic results. [Water Level, 38]. Not only did Irma produce higher water levels than Frances, it also exceeded those of Jeanne. [Compare AR 322856 at 322868 & 325435 at 326147, 326150]. Irma is thus the storm that is required now to be used to properly calibrate the Corps Surge model.¹² When purporting to be modeling “extreme events”, it is improper to ignore the type of event that actually produces extreme flood water levels. This was a violation of the Corps obligations under NEPA. Colorado Env. Coaltn. v. Salazar, 875 F.Supp.2nd 1233, 1256 (D. Colo. 2012) (failure to model impacts or provide explanation why it was impractical to do so violates NEPA).

Miccosukee Tribe of Indians of Fla. v. United States, 2008 WL 11332080 (S.D. Fla. Nov. 14, 2008) also demonstrates an SEIS is required. The court there found that NEPA required the Corps to prepare an SEIS for new information relating to flooding that would be caused by the project. Id. at *10 &*13. See *also*, Blanco v. Burton, 2006 WL 236-6046, at*7 -10 (E. D. La. 2006) (Gulf hurricanes of 2005 were exactly the kind

¹² The Corps used hurricane Dora as its second calibration storm. While Riverkeeper has no quarrel with the choice of Dora, it notes that the Corps again used 2010 bathymetry when calibrating the model water levels to observed Dora water level data. Using that bathymetry understates Dora’s impacts because it occurred in 1964 when the river depth was 20 feet shallower. [AR 325435 at 326160, 326150].

of new circumstances that required an SEIS). Here, the extensive and devastating flooding suffered by Jacksonville in the wake of Hurricane Irma similarly constitutes new circumstances that require preparation of an SEIS.

II. THE CORPS' WATER LEVEL STUDY AND CHARLESTON STUDY SHOULD SUPPLEMENT THE RECORD

The information contained in the Water Level study and the Charleston Analysis should be included in the Record. Both were available to the Corps prior to its initiation of review of flooding related to Irma. The Charleston study was complete October 2016. [Doc. 57-1, p. 2]. The Corps issued the Water Level study in August 18, 2017. [Water Level at Cover page]. The Corps' efforts to determine whether the flooding impacts of Hurricane Irma required a supplemental environmental impact statement did not begin until late November 2017. [AR 322856 at 322879]. Accordingly, these documents should have been consulted by the Corps prior to issuing its FONSI on Irma.¹³

In contrast to the willful blindness of the Jacksonville Corps with regard to flooding, the Corps in Charleston determined that its model analysis showing smaller increases than predicted here, .1 feet and .3 feet in some places, was sufficient to trigger a more in-depth study. [Charleston P. 1]. Further, upon doing the additional study, if necessary, the Charleston Corps would determine if the impacts were significant enough to affect flood hazard zones or the area. [Charleston Exec. Summ.]. Additionally, the admission of the Charleston Corps that dredging of the channel required compliance with Executive Order 11988 might assist the court if the

¹³ While the Corps must certainly have been aware of its own Water Level study at or near the time of its publication, Riverkeeper did not become aware of this Corps study until after the case was stayed.

Jacksonville Corps holds to its unexplained claim that there will be no impacts to the floodplain.

The Corps' Water Level Study provides valuable insight for the court into the impacts on water levels of prior river deepening events. In particular, it points to water level increases where past dredging has caused water levels to double. This demonstrates the significant flooding impact missed by the Corps here because of its failure to evaluate the cumulative water level impacts of past deepening.

In the absence of an explanation by the Corps with regarding its failure to evaluate past flooding impacts, the Corps' Water Level Water-Level Study and the Charleston Flooding Analysis should be admitted and considered because they provide additional information otherwise unavailable to the court to demonstrate that the Corps has not considered all of the relevant factors in making its decision. Sierra Club, Inc. v. Leavitt, 488 F.3d 904, 914 n.16 (11th Cir. 2007). Additionally, they should be included because the complex subject matter regarding cumulative impacts modeling of water levels requires explanation. Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs, 87 F.3d 1242, 1246. n.1 (11th Cir. 1996) (*citing* Animal Def. Council v. Hodel, 840 F.2d 1432, 1436 – 37 (9th Cir. 1988)).

III. Injunctive Relief is Warranted

Injunctive relief is warranted where the movant establishes (1) it has prevailed on the merits; (2) that irreparable injury will be suffered unless the injunction issues; (3) that the threatened harm to the movant outweighs whatever harm the injunction may cause to the nonmoving party; and (4) that the proposed injunction would not be adverse to

the public interest. Florida Wildlife Fed. v. U.S. Army Corps of Eng'rs, 404 F.Supp.2nd 1352, 1361 (S.D. Fla. 2005).

Riverkeeper has succeeded in showing that the Corps violated NEPA with regard to cumulative impacts, mitigation and the need for a supplemental EIS for flooding. It has therefore succeeded on the merits. Additionally, it has demonstrated irreparable harm. Miccosukee Tribe, at 11 (irreparable harm results where environmental concerns have not been addressed by the NEPA process) *citing*, Protect Key West, Inc. v. Cheney, 795 F.Supp. 1552, 1563 (S. D. Fla. 1992) *citing* Sierra Club v. Marsh, 872 F. 2nd 497, 504 (1st Cir. 1989). Salinity increases and increased flooding will cause additional degradation of the river and harm to Riverkeeper members. This constitutes irreparable harm. Id.

The balance of harms also favors granting an injunction. Where environmental injury is shown as it is here, the balance of harms favors issuance of an injunction to protect the environment. Miccosukee Tribe, at*12, *citing* Amoco Prod. Co. v. Village of Gambell, AK, 480 U.S. 531, 545 (1987).

An injunction will serve the public interest because NEPA serves the public interest by protecting the public and assuring that the intent of the legislature is effectuated. An injunction will stop harm to the environment that would be caused by the implementation of a plan that violated NEPA. Id. at *12.

WHEREFORE, the St. Johns Riverkeeper requests that this court grant Summary Judgment against the Defendants, declare that the Corps has violated NEPA, remand the case to the Corps and enjoin any further dredging of the St. Johns River until NEPA compliance is achieved.

Bledsoe Jacobson Schmidt Wright & Sussman

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of August, 2019, the undersigned filed the above document which will be served via the CM/ECF system on the following: Christopher M. Kise, Esq., ckise@foley.com and cforjet@foley.com; Brooks W. Moore, Esq., brooks.w.moore@usace.army.mil, brookswilkersonmoore@yahoo.com; Brittany Berger, Esq., Brittany.m.berger@usace.army.mil; Emily Friend O'Leary, Esq., eoleary@foley.com, dcollins@foley.com, sperron@foley.com; Joshua Hawkes, Esq., Jhawkes@foley.com and Claudia Antonacci Hadijgeorgiou, Esq., Claudia.hadjigeorgiou@usdoj.gov, efile_nrs.enrd@usdoj.gov.

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