NOTES

Atchafalaya Basinkeeper v. United States Army Corps of Engineers: Construction Resumes on the Bayou Bridge Pipeline

I. OVERVIEW

Despite protests from environmental activists, numerous arrests,[1] and a federal district court injunction, construction on the Bayou Bridge Pipeline was essentially approved within the Atchafalaya Basin in Louisiana when the the United States Court of Appeals for the Fifth Circuit vacated the injunction.[2] When complete, the pipeline is intended to carry crude oil 162 miles across wetlands along a route from Lake Charles, Louisiana, to terminals in St. James.[3] After a year-long review, the United States Army Corps of Engineers (Corps) issued Bayou Bridge Pipeline, L.L.C. (Bayou Bridge) a permit to build portions of a crude-oil pipeline across wetlands in the Atchafalaya Basin.[4] Before federal agencies like the Corps may approve projects affecting the environment, they are required to implement the National Environmental Policy Act's (NEPA) procedures.[5] Under NEPA, agencies begin by preparing an environmental assessment (EA) designed to determine whether a more substantial analysis of environmental impact is required.[6] Here, the Corps authored two EAs, one under the Rivers and Harbors Act and the other under the

1. *See, e.g.*, Steve Hardy, *Felony Cases Mount Against Protesters Fighting Bayou Bridge from Land, Sea, and Air*, ADVOCATE (Sept. 8, 2018), https://www.theadvocate.com/baton_rouge/news/crime_police/article_4eb86460-a635-11e8-8ad7-cf31e43dabd5.html.

2. *See* Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs, 894 F.3d 692, 704 (5th Cir. 2018).

3. *Id.* at 695.

4. *Id.* "Bayou Bridge" is a convenience that includes defendant-appellant Stupp Brothers, Inc. *Id.*

5. *See, e.g.*, *id.*

6. *See, e.g.*, *id.*

Clean Water Act (CWA).[7] Together, the EAs spanned over 200 pages, plus nearly 200 pages more of appendices.[8] From these assessments, the Corps determined that a full Environmental Impact Statement (EIS) was not required for the Bayou Bridge project and issued a Finding of No Significant Impact (FONSI).[9] On December 14, 2017, the Corps issued a permit to Bayou Bridge for construction of the pipeline.[10]

Atchafalaya Basinkeeper and other organizations (Basinkeeper) interested in the ecology of the Atchafalaya Basin brought suit in January 2018 against the Corps and sought a preliminary injunction to redress alleged violations of NEPA and the CWA; Bayou Bridge intervened as defendants.[11] The United States District Court for the Middle District of Louisiana held an expedited hearing and granted an injunction against Bayou Bridge only within the Atchafalaya Basin.[12] Bayou Bridge then sought a stay of the injunction pending appeal, which the United States Court of Appeals for the Fifth Circuit granted in a split decision.[13] The United States Court of Appeals for the Fifth Circuit *held* that the project did not have a significant environmental impact, and therefore, a FONSI, rather than a mitigated FONSI, was warranted; there was a rational connection between project, CWA, and NEPA implications, and the Corps' EAs were not required to discuss cumulative effects with regard to preexisting spoil banks. *Atchafalaya Basinkeeper v. United States Army Corps of Engineers*, 894 F.3d 692, 695 (5th Cir. 2018).

II. BACKGROUND

This case is grounded in an understanding of two federal statutes—NEPA and the CWA—while also implicating a third, the Rivers and Harbors Act of 1899, under which the Corps issued the EA pertaining to structures (the construction of the pipeline itself).[14] First, NEPA, enacted in 1969, constitutes an environmental Magna Carta that has significantly influenced federal agencies in their decision-making.[15] Under NEPA, all major federal actions "significantly affecting the quality of the human

7. *Id.* (the Rivers and Harbors Act EA was under section 408 of that Act, while the other EA was under section 404 of the CWA).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 696.
13. *Id.*
14. *See id.* at 695.
15. *See* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (2018).

environment" require a "detailed statement"—an EIS—by the agency taking an action with such significant environmental impact.[16] An EIS must detail the effects of the proposed action and any alternatives.[17] Since the enactment of NEPA, courts have navigated, and often diverged in their interpretation and application of, the substantive requirements of the Act.[18]

An early case examining the significance requirement for agency actions and criteria for when environmental impact is significant was *Hanly v. Kleindienst*.[19] In *Hanly*, the Second Circuit Court of Appeals adopted a two-pronged framework for determining a proposed action's environmental significance.[20] Under that framework, an agency should analyze a proposed action relative to (1) the adverse environmental effects it would cause in excess of existing uses,[21] and (2) how its effects would combine with existing adverse conditions or previous uses in the affected area.[22] More recently, the Ninth Circuit Court of Appeals held that, if an agency's action "may" have a significant effect on the environment, it is not necessary to show that a significant impact will "in fact" occur.[23] The Fifth Circuit Court of Appeals has long held a similar view: "[I]f the court finds that the project may cause a significant degradation of some human environmental factor (even though other environmental factors are affected beneficially or not at all), the court should require the filing of an impact statement."[24]

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16. *See id.* § 4332(C).

17. *Id.*

18. *See, e.g.*, Vt. Yankee Nuclear Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 548 (1978) (holding that NEPA did not impose procedural requirements beyond those of the Administrative Procedure Act with regard to Atomic Energy Commission rulemaking); Sabine River Auth. v. U.S. Dep't of Interior, 951 F.2d 669, 679-80 (5th Cir. 1992) (holding that NEPA did not require the U.S. Fish & Wildlife Service to compile an EIS when it acquired a wetlands nondevelopment easement because acceptance of such did not alter the environmental status quo); Fritiofson v. Alexander, 772 F.2d 1225, 1243 (5th Cir. 1985) (holding that NEPA, and related Council on Environmental Quality (CEQ) regulations, required consideration of cumulative impacts when deciding whether a single proposed action would have a significant environmental impact relative to "reasonably foreseeable future actions"); Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1118 (D.C. Cir. 1971) (emphasizing that NEPA requires consideration of environmental impact to the "fullest extent possible").

19. *See* Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972).

20. *Id.* at 830-31.

21. *Id.* at 830.

22. *Id.* at 831.

23. Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 864-65 (9th Cir. 2005).

24. Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 (5th Cir. 1973); *see also* Fritiofson v. Alexander, 772 F.2d 1225, 1238 (5th Cir. 1985) (admitting that the Fifth Circuit's decisions applying *Kreger* had not been entirely "consistent" or "pellucid" (citations omitted)).

O'Reilly v. United States Army Corps of Engineers marked a defining moment in the interpretation of FONSI challenges in the Fifth Circuit.[25] In that case, individuals affected by dredging and filling of wetlands near a residential development brought suit challenging a Corps FONSI, which had resulted in the issuance of a permit under section 404 of the CWA, claiming that it was arbitrary and capricious for three reasons.[26] The Fifth Circuit held in *O'Reilly* that the Corps acted arbitrarily in issuing a FONSI that failed to detail how mitigation measures would render adverse environmental effects insignificant, as well as in failing to consider the cumulative effects of the project.[27]

Second, when Congress enacted the 1972 amendments to the Federal Water Pollution Control Act (FWPCA), which came to be known collectively as the CWA, it did so in an effort to restore and maintain the "chemical, physical, and biological integrity of the [the] Nation's waters."[28] Because the FWPCA had persistently failed to suitably remedy the water pollution problem, Congress enacted the far more expansive CWA,[29] which contains provisions establishing effluent limitations and standards.[30] The CWA defines "navigable waters" as the "waters of the United States, including the territorial seas,"[31] a definition that, while recently contentious and in limbo,[32] was not in dispute in the instant matter. More relevant here was section 404 of the CWA, which authorizes the Secretary of the Army, acting through the Corps of Engineers, to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites.[33]

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25. *See* O'Reilly v. U.S. Army Corps of Eng'rs, 477 F.3d 225 (5th Cir. 2007).
26. *Id.* at 227.
27. *Id.*
28. Clean Water Act, 33 U.S.C. § 1251(a) (2018).
29. *See, e.g.*, Ann K. Wooster, Annotation, *Actions Brought Under the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C.A. §§ 1251 et seq.)—Supreme Court Cases*, 163 A.L.R. Fed. 531, § 2(a) (2018) (noting that the FWPCA was amended many times from 1948 until 1972, when the Clean Water Act was enacted, because the FWPCA and its amendments "had failed to solve the nation's water pollution problems").
30. *See* 33 U.S.C. § 1311.
31. *Id.* § 1362(7).
32. *See, e.g.*, Rapanos v. United States, 547 U.S. 715 (2006) (containing a plurality opinion that, with J. Kennedy's opinion concurring in the judgment, awarded judgment to the plaintiff suing the federal government; the plurality opinion, authored by J. Scalia, held that only wetlands with a continuous surface connection to "waters of the United States" were "adjacent to" such waters so as to be covered under the CWA; J. Kennedy's swing opinion focused instead on determining whether a "significant nexus" with navigable-in-fact waters existed). Ambiguity with regard to the "waters of the United States" has continued since *Rapanos* with regard to, in particular, EPA rulemaking and groundwater cases.
33. 33 U.S.C. § 1344.

Finally, when the Rivers and Harbors Act was enacted in 1899, it made throwing, discharging, or depositing any refuse matter of any kind into the navigable waters of the United States illegal.[34] This Act further provides that any alteration of a work "built by the United States," such as a levee, dike, pier, or jetty, requires an Army permit based on the Corps' recommendation that the alteration "will not be injurious to the public interest."[35]

III. COURT'S DECISION

In the noted case, the Fifth Circuit noted, critically, that the district court failed to distinguish between the "mitigated FONSI" at issue in *O'Reilly* and the FONSI at issue in the instant matter.[36] This critical distinction ultimately led the appeals court to vacate the preliminary injunction issued by the district court on the ground that the district court committed legal error in interpreting the applicable NEPA and CWA provisions.[37] In a split decision, the Fifth Circuit ruled that the district court "misperceived the applicable regulations" and found that the Corps' analysis vindicated its decision that an EA sufficed to satisfy its obligations under NEPA and the CWA.[38]

Here, the Fifth Circuit reviewed the district court's preliminary injunction under the deferential abuse-of-discretion standard.[39] With regard to the Corps' FONSI determination, the appeals court noted that it was subject to the Administrative Procedure Act's deferential arbitrary-and-capricious standard.[40] Noting that the district court found three fundamental failures in the Corps' FONSI, the Fifth Circuit reframed the analysis by emphasizing the aforementioned failure to distinguish between a mitigated FONSI (*O'Reilly*)—which meant that, without mitigation (*O'Reilly* failed to properly describe and substantiate mitigation measures), a project would have a significant impact—and a FONSI that found no significant impact *because* of explicated mitigation measures (here).[41] Failure to recognize this distinction, the Fifth Circuit noted, had

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34. Rivers and Harbors Act of 1899, 33 U.S.C. § 407.
35. *Id.* § 408.
36. Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs, 894 F.3d 692, 698 (5th Cir. 2018).
37. *Id.* at 704.
38. *Id.* at 695.
39. *Id.* at 696 (citing La Union Del Pueblo Entero v. FEMA, 608 F.3d 217, 220 (5th Cir. 2010)).
40. *Id.*
41. *Id.* at 698.

set the district court down a path of legal error.[42] This failure had led the district court to incorrectly deem the consideration of mitigation techniques contained in the EAs to be merely "perfunctory."[43]

With regard to the consideration of cumulative impacts under NEPA, the district court had determined that the Corps was "myopic" in its consideration of cumulative impacts such that its EA was deficient in that regard, specifically with regard to spoil banks.[44] Citing federal regulations with regard to the definition of "cumulative impact," the Fifth Circuit reasoned that, because proposed mitigation techniques would render, in the Corps' estimation, no incremental effects from spoil banks, there could be, by definition, no cumulative effects from spoil banks.[45] In this regard, the Fifth Circuit also found significant the EA's determination that the Bayou Bridge project only threatened temporary or conversion loss of wetlands, not permanent loss.[46]

Given this reading in combination with the aforementioned determination that the FONSI here was not "mitigated," the Fifth Circuit reversed the district court's holding with regard to Basinkeeper's NEPA-based arguments.[47]

The Fifth Circuit necessarily also considered the question of whether the Corps properly applied CWA regulations in determining that Bayou Bridge could "(1) utilize approved construction methods within the Basin, and (2) purchase (a) in-kind mitigation credits . . . and, when those were exhausted, (b) out-of-kind credits of bottomland hardwood acreage within the watershed to compensate for the project's impact."[48] Thus, consideration of the CWA issue(s) likewise entailed examination of mitigation techniques, but in the more explicitly defined realm of Corps compensatory mitigation, as opposed to the broader, more conceptual NEPA realm.[49]

The CWA requires such compensatory mitigation when aquatic functions and services will be lost via permitted activity.[50] The Fifth Circuit found that the district court misread 33 C.F.R. § 332.3(a)(1) when it concluded that the Corps did not explain the need for, or alternatives to,

42. *Id.* at 698-99.
43. *Id.* at 697.
44. *Id.* at 703.
45. *Id.* (citing 40 C.F.R. § 1508.7 (2018)).
46. *Id.*
47. *Id.* at 699, 704.
48. *Id.* at 699.
49. *See id.* at 699-700.
50. *Id.* at 699 (citing 33 C.F.R. § 332.3(a)(1)).

out-of-kind mitigation credits.[51] Additionally, the court here found that the lower court failed to acknowledge that the regulation was being implemented via the Louisiana Wetland Rapid Assessment Method (LRAM).[52] The Fifth Circuit determined that the district court was incorrect in stating that 33 C.F.R. § 332.3 "does not 'impos[e] a mechanical and rigid hierarchy' establishing a preference for out-of-kind mitigation" (in the form of mitigation banks).[53]

Specifically, the court identified regulatory language supporting a mechanical and rigid hierarchy for out-of-kind mitigation practices.[54] For example, the court noted that the regulation specifically states that mitigation banks may be used for such compensatory mitigation because they usually involve consolidating compensatory projects where ecologically appropriate.[55] Further, the regulation states that the type and location options of mitigation areas shall be considered "*in the order presented in paragraphs (b)(2) through (b)(6)*."[56] The court stated, "If this language does not set up a plain 'hierarchy' strongly approving of mitigation banks—as opposed to [Basinkeeper's] proffered clean-up by Bayou Bridge of spoil banks created by other pipeline builders long ago—it is hard to know what would do."[57] Thus, the only question was whether the Corps sufficiently documented how the out-of-kind credits served the Basin's aquatic-ecological needs.[58]

To answer this question, the Fifth Circuit reviewed the LRAM used to approve Bayou Bridge's permit.[59] The LRAM assigns a numerical value to all types of wetlands found in Louisiana that would be affected by a Corps permit.[60] Using scientific methods, the LRAM converts a numerical value for lost wetlands into mitigation bank credits.[61] The Fifth Circuit noted that the Supreme Court held that the use of such scientific methodology is subject to "particular" judicial deference.[62] Further, the court held that, under NEPA, the CWA, and Supreme Court precedent, all that was required of the Corps in linking the lost aquatic functions and

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51. *Id.*
52. *Id.*
53. *Id.* (citing 33 C.F.R. § 332.3).
54. *Id.* at 699-700.
55. *Id.* at 699 (citing 33 C.F.R. § 332.3(a)(1)).
56. *Id.* (citing 33 C.F.R. § 332.3(b)(1)).
57. *Id.* at 700.
58. *Id.*
59. *Id.* at 700-01.
60. *Id.* at 701.
61. *Id.*
62. *Id.* (citing Marsh v. Ore. Nat. Res. Council, 490 U.S. 360, 377-78 (1989)).

services with mitigation bank credits was a rational connection.[63] Given this relatively low hurdle of establishing a rational connection, the Fifth Circuit, after providing seven reasons why such a rational connection was evident in the EAs, held that the Corps' decision in this regard was not arbitrary and capricious.[64]

As noted, the holding in the noted case was not unanimous. In a dissenting opinion, Judge Reavley argued that, broadly, the Corps' EAs lacked sufficient explanation in key respects.[65] First, Reavley argued that the CWA and accordant regulations obliged the Corps to determine and subsequently proffer an explanation as to how the Corps' one-for-one swap of cypress-tupelo acreage for bottomland-hardwood acreage would meet the aquatic resource needs of the watershed.[66] Judge Reavley maintained that the LRAM method failed to sufficiently provide such an explanation because it did not account for potential impact differentials between varying front-end (cypress-tupelo) and back-end (bottomland-hardwood) resource types.[67] Second, Reavley took issue with the majority's distinction between types of FONSIs relative to their incorporation of mitigation.[68] Reavley felt that, in essence, the majority was unduly formalistic in distinguishing between a "two-part" mitigated FONSI and a one-step FONSI.[69] The dissent argued that, rather than distinguishing between FONSIs along such a facile dimension, *O'Reilly*'s lesson was that what mattered was whether or not a FONSI relied upon mitigation to differentiate between significant and insignificant environmental impact.[70] Thus it was that Judge Reavley stated, "When an agency cloaks the importance of mitigation behind an ambiguous administrative record, I would hold the agency to the standard articulated in *O'Reilly*."[71]

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63. *Id.* (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).
64. *Id.* at 701-03.
65. *See id.* at 704-07 (J. Reavley, dissenting).
66. *Id.* at 705.
67. *Id.* at 705-06.
68. *Id.* at 706.
69. *Id.*
70. *Id.* at 706-07.
71. *Id.* at 707.

IV. ANALYSIS

In the noted case, differences between the majority and dissent may carry critical importance for future NEPA and Corps permitting battles.[72] First, NEPA's EA and EIS requirements are predicated on finding and analyzing potential significant impacts to the human environment.[73] In the noted case, the majority's distinction between a FONSI and a "mitigated FONSI" potentially diminishes the scenarios in which an EIS would be required.[74] While an EA may disclose some environmental impacts, it lacks the expansive detail comprised by an EIS.[75] By allowing an agency to more readily avoid an EIS by issuing a FONSI including whatever purported mitigation techniques, the court may have defanged the "detailed statement" requirement that lies at the heart of NEPA.[76] Further, by also accepting, in particular, an EA's conclusion that mitigation techniques would somehow provide for *no* incremental impact whatsoever, the court doubled down on its reliance upon largely unexplained mitigation measures as it eschewed scrutiny of possible cumulative effects with regard to accumulating spoil banks.[77] Even further, given, as noted by the dissent, the exceedingly fine line drawn[78] by the appeals court between a FONSI that incorporates mitigation techniques and a "mitigated FONSI," the Fifth Circuit may have overstepped its bounds given the deferential standard of review; in other words, the court here had to stretch to justify its decision relative to the abuse-of-discretion standard.[79]

Second, the majority rested their decision on "particular" deference to the LRAM, while the dissent noted its lack of a "critical explanatory component."[80] The facts of the case make clear that the Corps swapped, on a one-for-one basis, acres of cypress-tupelo swamp for acres of

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72. *See, e.g.*, *id.* at 706 (J. Reavley, dissenting) ("Whatever the ultimate merits of the plaintiffs' claim under the National Environmental Policy Act, we ought to at least apply the right standard.").

73. National Environmental Policy Act of 1969, 42 U.S.C. § 4332(C) (2018).

74. *See, e.g.*, *Atchafalaya Basinkeeper*, 894 F.3d at 707 (J. Reavley, dissenting) ("[T]he record obscures whether the impacts would have been significant absent the mitigation.").

75. *See, e.g.*, *id.* at 695 (noting that NEPA requires a "concise" EA in order to determine whether an EIS is required).

76. *See* 42 U.S.C. § 4332(C).

77. *See Atchafalaya Basinkeeper*, 894 F.3d at 703 ("Here, the EAs concluded that, because of appropriate mitigation measures . . . there would be *no incremental impact*.").

78. *See id.* at 706-07 (J. Reavley, dissenting) (stating, with regard to the distinction between the two types of FONSIs, that it was "all form with no substance" and allowed the Corps to "tiptoe on a nonexistent fence").

79. *See id.* at 696 (noting that the standard of review was abuse of discretion).

80. *Id.* at 701, 705 (J. Reavley, dissenting).

bottomland-hardwood.[81] Both majority and dissent agreed that the LRAM took many factors into account, but the dissent noted, critically, that resource type was not accounted for under the LRAM.[82] Under the CWA, the Corps owes a duty to determine that the aquatic resource needs of the watershed have been met and to document that basis in the record.[83] Cypress-tupelo swamp and bottomland-hardwood are classified differently because they supply different functions as defined in CWA regulations.[84] Thus, a one-for-one swap of different resource types could clearly alter environmental structure and function in those areas.[85] By deferring decisions to the LRAM (or similar models) without requiring additional explanation when resource types have been substituted, courts may contravene key CWA provisions and regulations by allowing undue alteration of environmental structure and function.[86]

V. CONCLUSION

While the Fifth Circuit's holding in this case will be celebrated by pipeline supporters, environmentalists will remain deeply unsatisfied with this result. They will inevitably see this case as an erosion of protections under, in particular, NEPA. Though the majority and dissent both cite to NEPA, *O'Reilly*, and the same regulations, they arrived at vastly different conclusions. Accordingly, battles over these regulations are likely to appear again within the Fifth Circuit and beyond. If other circuits choose to distinguish between types of mitigated FONSIs like the Fifth Circuit has done, sensitive areas where out-kind mitigation strategies are used could be put in especial danger, especially when considering a similar refusal to acknowledge cumulative impacts.

Though protesters from around the nation continue to flock to the Atchafalaya Basin with the goal of slowing construction, the wisdom of the Fifth Circuit's ruling will be revealed over time. Construction on the pipeline resumed soon after the injunction was lifted. If the Corps' EAs were accurate, the Atchafalaya Basin will sustain no significant damage while construction will add some jobs and resources to the local economy. If the pipeline's construction results in significant damage to the Basin, it

81. *Id.* at 705 (J. Reavley, dissenting).
82. *Id.* at 701, 705-06 (J. Reavley, dissenting).
83. *Id.* at 699-700.
84. *See id.* at 705-06 (J. Reavley, dissenting) ("The regulations prefer in-kind over out-of-kind mitigation precisely because different resource types supply different functions . . . ." (citing 33 C.F.R. § 332.3(e)(1) (2018))).
85. *See id.*
86. *See id.*

will likely be clear that the Corps' EA was somehow remiss. It would be particularly unfortunate if any damage occurs that could have been prevented by the development of an EIS or analysis of resource types within the LRAM. If any significant environmental impacts do occur, environmental groups will be primed for even more intensive fights against future pipeline permitting decisions. For now, there is one thing both sides can agree on: there will be less to fight about if construction of the pipeline goes smoothly and the impacts of its construction are actually mitigated.

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