BAYOU BRIDGE PIPELINE, LLC **16TH JUDICIAL DISTRICT COURT**

VERSUS

DOCKET NO 87011-E

38.00 ACRES, MORE OR LESS, LOCATED IN ST. MARTIN PARISH; BARRY SCOTT CARLINE *ET AL.*

ST. MARTIN PARISH, LOUISIANA

BAYOU BRIDGE PIPELINE, LLC'S BRIEF AS TO EXCEPTIONS AND AFFIRMATIVE DEFENSES TO BE CONSIDERED BY THE COURT ON NOVEMBER 16, 2018

NOW INTO COURT, through undersigned counsel, comes Plaintiff Bayou Bridge Pipeline, LLC ("Bayou Bridge"), in accordance with the Agreed Scheduling Order, and submits this brief in support of its positions on exceptions and affirmative defenses to be considered by the Court on November 16, 2018.

BACKGROUND

This is a simple expropriation matter, involving a 38-acre uninhabited tract of land in St. Martin Parish (the "Property"). Notwithstanding the nominal appraised value of the servitude, Bayou Bridge has gone to great lengths to identify, locate, and negotiate with literally hundreds of heirs on this Property. At present, Bayou Bridge has entered into over 400 servitude agreements, paying heirs far in excess of the value of their interest. In fact, for just the servitude rights—which apply to only approximately 1/38th of the entire tract—Bayou Bridge has already paid total compensation in excess of the value of the ***entire*** Property. In addition to the agreements Bayou Bridge reached with those heirs, another approximately 470 heirs are identified in this litigation and the companion expropriation case *Bayou Bridge Pipeline, LLC v. Akers, et al.*, also pending before this Court.

Of those approximately 470 heirs in the expropriations before the Court, three individuals have joined the crusade by activist organizations whose sole objective is to kill the Bayou Bridge Pipeline: Peter K. Aaslestad, Katherine Aaslestad, and Theda Larson-Wright (collectively, the "Defendants"). Mr. and Ms. Aaslestad each possess, at best, approximately one-half of one percent interest in the Property at issue. Ms. Wright's interest is even less—approximately one-tenth of one percent. Mr. Aaslestad lives in Virginia, Ms. Aaslestad in West Virginia, and Ms. Larson-Wright in New Mexico. Not one of these individuals claims to live on the Property or to

have ever set foot on the Property. Not one has ever paid any taxes on the Property or done anything to maintain the Property.

What is clear from their pleadings and media interviews is that these individuals, along with the lawyers and organizations behind them, want to stop Bayou Bridge from constructing this pipeline. Exchanging their heretofore disinterest in the Property for outrage, Defendants have taken on roles of victimized landowners. And, from their homes far from St. Martin Parish, Defendants, supported by the organizations advancing their claims, intend to use their combined claim of 1.1% interest in ***one*** of 714 tracts of land along the pipeline route to take down the entire project by asserting numerous exceptions, constitutional violations, and procedural defects.

Pursuant to the Agreed Scheduling Order, the Court set certain claims and issues for hearing that Bayou Bridge will address herein. Those claims and issues are as follows:

(1) Exceptions and Affirmative Defenses to the Petition for Expropriation:

- (a) Bayou Bridge's Common Carrier Status
- (b) Indispensable Parties
- (c) Pleading Sufficiency
- (d) Prematurity (statutory prerequisites and permits)
- (e) Defendants' Constitutional Challenge to Expropriation Laws

(2) Exceptions to the Reconventional Demand:

- (a) No Right of Action for Federal and State Due Process Claims
- (b) Prematurity of Federal and State Due Process Claims

For the reasons set forth herein, Defendants' exceptions, challenges, and defenses are without merit. Bayou Bridge has properly instituted and pursued this expropriation matter and respectfully requests that the Court find the same and overrule Defendants' exceptions and challenges.

LAW AND ARGUMENT

1. BAYOU BRIDGE IS A COMMON CARRIER GRANTED THE AUTHORITY TO EXPROPRIATE BY LOUISIANA LAW.

"The right to expropriate is given to private owners and operators of pipelines for the transmission or transportation as a common carrier of petroleum, petroleum products and petroleum by-products." *Coleman v. Chevron Pipe Line Co.*, No. 94-1773 (La. App. 4 Cir 04/24/96), 673 So.2d 291, 295 (citations omitted). Louisiana law defines common carriers to

include entities that are "engaged in the transportation of petroleum[1] as public utilities and common carriers for hire; or which on proper showing may be legally held a common carrier from the nature of the business conducted, or from the manner in which such business is carried on." La. R.S. § 45:251(1). Common carriers have been granted expropriation authority. *See* La. R.S. § 19:2(8) (providing expropriation rights to "[a]ll persons included in the definition of common carrier pipelines as set forth in R.S. 45:251"), La. R.S. § 45:254 ("All persons included in the definition of common carrier pipe lines as set forth in R.S. 45:251 have the right of expropriation with authority to expropriate private property under the state expropriation laws for use in its common carrier pipe line business. . . .").

Bayou Bridge falls squarely within the definition of a common carrier. In support of Bayou Bridge's allegations as to common carrier status, its representative, Mr. Kevin Taliaferro, will testify that Bayou Bridge is engaged in the midstream business of constructing and operating petroleum transmission pipelines for downstream suppliers of crude oil. Bayou Bridge does not own the crude oil being transported, but merely acts as a common carrier transporter for the oil commodity owned by others (called "customers" or "shippers"). Mr. Taliaferro will testify that in 2015-2016, Bayou Bridge constructed a 30-inch oil pipeline from Nederland, Texas, to Lake Charles, Louisiana. This pipeline was constructed by Bayou Bridge to facilitate the movement of crude oil from an existing large crude oil terminal and hub facility in Nederland, Texas, to refining infrastructure in and around Lake Charles, Louisiana. Numerous third party customers/shippers committed to this infrastructure expansion entering into anchor shipping agreements with Bayou Bridge that justified the need for the pipeline infrastructure expansion.

As construction of that pipeline was underway, it became apparent that other refining capacity in Louisiana could be made available to shippers of crude oil if a crude pipeline, a reliable and safe method of transportation, could be constructed to open up this refining capacity to domestic sources of production that were being sourced to the hub and storage facilities in Nederland. Historically, Louisiana refining capacity and crude markets have been dependent on limited/constrained, less reliable, more expensive, and slower marine and rail delivery. An additional crude pipeline connecting existing hub and terminaling facilities in the Gulf Coast to Louisiana's existing refineries would provide enhanced opportunities to deliver varying mixes of domestic crude oil to Louisiana markets, greatly improving the efficiency and expanding the

[1] Petroleum includes "crude petroleum, crude petroleum products, distillate, condensate, liquefied petroleum gas, any hydrocarbon in a liquid state, any product in a liquid state which is derived in whole or in part from any hydrocarbon, and any mixture or mixtures thereof. . . ." La. R.S. § 45:251(2).

reach of Louisiana's refining facilities. Based on these market factors, in October 2015, Bayou Bridge initiated an open season[2] to gauge market interest in expanding the Nederland-Lake Charles pipeline across Louisiana to St. James. The open season process resulted in several binding commitments from third party shippers. In addition, four third party companies contracted with Bayou Bridge to connect their terminals and refineries in the Lake Charles or St. James area to the pipeline.

Without regard to how Louisiana statutory laws define common carrier pipelines, Defendants assert an exception of no cause of action based upon Bayou Bridge's briefing in an unrelated legal proceeding examining the reach of Louisiana's Public Records Law. *See Atchafalaya Basinkeeper, et al. v. Bayou Bridge Pipeline, LLC and Chris Martin*, No. 2018-CA-0417. Generally, in that action, Bayou Bridge asserts that it is not subject to the Louisiana Public Records Law because its use of the power of expropriation does not render it an "instrumentality of the state" and thus a "public body" that is subject to the Public Records Law. Defendants selectively extract Bayou Bridge's statements in that action to support their argument here that Bayou Bridge is not a common carrier. However, Defendants' analysis is confused and incorrectly misapplies the law.

In sum, Defendants argue that Bayou Bridge's statements in the related litigation suggest that it is not a quasi-public corporation, but instead a private, for-profit entity. Thus, the argument concludes, Bayou Bridge is not a common carrier and cannot exercise the right of expropriation. However, Defendants' assertions ignore the statutory definition of common carrier pipeline—a definition that, as discussed previously, includes Bayou Bridge. The fact that Bayou Bridge is a private, for-profit entity does not alter its status. The Louisiana Constitution clearly provides: "Property shall not be taken or damaged by any ***private*** entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question." La. Const. Art. I, § 4 (emphasis supplied). Further, Louisiana law specifically provides that "[t]he right to expropriate is given to private owners and operators of pipelines for the transmission or transportation as a common carrier of petroleum, petroleum products and petroleum by-products." *Coleman v. Chevron,* 94-CA-1773 (La. App. 4th 1996), 673 So.2d 291,

[2] The term "Open Season" refers to a recognized process whereby the commercial need for an infrastructure project is assessed openly in the commercial market place.

296. This describes the exact nature of Bayou Bridge's business. Consequently, Bayou Bridge is clearly a common carrier, and Defendants' exception of no right of action should be overruled.

2. DEFENDANTS' EXCEPTIONS OF NONJOINDER AND PREMATURITY FAIL.

Defendants' contend that Bayou Bridge did not utilize thorough, good faith efforts to identify and negotiate with all landowners. Thus, Bayou Bridge failed to name indispensable parties and improperly requested that an attorney be appointed for absentee defendants. As each defendant raises different claims, each will be addressed in turn. Nonetheless, all exceptions fail.

A. Nonjoinder of Karen Aaslestad-Aubouy

First, the Aaslestad Defendants claim that Bayou Bridge failed to join their sister Karen Aaslestad. However, Karen Aaslestad is a party defendant under the name Karen A. Aubouy in the companion case *Bayou Bridge Pipeline, LLC v. Akers*. Thus, the Aaslestad Defendants' exception of nonjoinder should be overruled.

B. Nonjoinder of Larson-Wright's nieces and prematurity exception as to absentees

Larson-Wright asserts an objection of nonjoinder as to the two nieces of her deceased sister Jo Lyndal Larson Read. However, the public records of St. Martin Parish do not support Larson-Wright's exception. First, Bayou Bridge has not located a document in the Parish's public records, wherein an interest in the Property is conveyed to Jo Lyndal Larson Read. Second, there is no judgment of possession in the records of St. Martin Parish whereby a Jo Lyndal Larson Read conveys an interest in this property to her daughters. Moreover, Bayou Bridge has not even been able to locate a document identifying Jo Lyndal Larson Read as a sister to Defendant Larson-Wright. "[T]he plaintiff in an expropriation suit has an absolute right to place reliance upon the public records and need not name as a defendant a party with an unrecorded right." *Orleans Par. Sch. Bd. v. Lupo*, 470 So.2d 202, 204-05 (La. App. 4th Cir. 1985), writ dismissed 484 So.2d 128 (La. 1986); *United Gas Pipe Line Company v. New Orleans Terminal Company*, 156 So.2d 297 (La. App. 4th Cir. 1963). Therefore, because no public records support Ms. Larson-Wright's claims as to her nieces, they are not indispensable parties.

Larson-Wright next claims that Bayou Bridge has acted improperly in requesting an attorney to represent her sisters, Alberta Stevens and Judy Hernandez. She suggests that Bayou Bridge cannot rely on the public record, but must instead become a private investigator. Relying on this standard, Larson-Wright faults Bayou Bridge for not being able to locate her sisters, Alberta Stevens and Judy Hernandez, whose names appear in the St. Martin public record in

1978 with no indication of where they live, no social security number, and no date of birth. In support of this exception, Defendant submits an affidavit of a private investigator, Alan Canterbury, who asserts that Bayou Bridge's efforts did not satisfy investigation industry standards. Mr. Canterbury may well be right about the usual and customary practice in the private investigator industry. But, that is not Bayou Bridge's industry, and nothing in the Louisiana statutes requires Bayou Bridge to become a private investigator to locate heirs.

Prior to filing suit, "an expropriating authority shall attempt in good faith to reach an agreement as to compensation with the owner of the property sought to be taken. . . ." La. R.S. § 19.2. Here, over the course of two years, Bayou Bridge searched for hundreds and hundreds of potential heirs that might own an interest in the Property. These efforts included searches of Tax Assessor records, courthouse title examination, research of probate matters, research on conventional websites such as Google and location services such as Intelius, and personal interviews with family members and locals in the area. As with many of these individuals, Bayou Bridge sent offer letters to Ms. Stevens at the last address it could find for her, which was in Texas. Its last letter was returned "DOES NOT LIVE HERE!" Due to the commonality of her name, Bayou Bridge was not able to ever locate an address for Ms. Hernandez. When it could not locate Ms. Stevens and Ms. Hernandez, Bayou Bridge did its best to protect their interest by properly requesting the appointment of a curator.

In *Thomas v. New Orleans Redevelopment Authority*, No. 2004-CA-1964 (La. App. 4 Cir. 10/6/06), 942 So.2d 1163, an expropriation case that is analogous to this case and more recent by decades than the cases cited by Defendants, the court held appointment of a curator was proper on similar facts.[3] The expropriator in *Thomas* was the New Orleans Redevelopment Authority ("NORA"). NORA sought to expropriate property from three landowners: Berwin Thomas, Latoya Augustine, and Michael Augustine.

First, the *Thomas* court noted that the vesting document conveying the interest to these landowners "recited the names, birth dates, and social security numbers of the plaintiffs, but does not indicate their respective addresses." *Id.* at 1164-65. The court stated that this was a violation of the public records act because it requires that the transferee's address be included in the vesting document. *Id.* The court noted the impact of the landowners' compliance failure:

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[3] The obvious difference between these cases is one of degree. Whereas the expropriator in *Thomas* was dealing with merely three absentee individuals, Bayou Bridge has had to contend with hundreds.

> In determining whether notice was reasonable, due regard for the ***practicality*** and ***peculiarities*** of the case must be considered. In this case, ***it was the plaintiffs own actions in failing to comply with the Louisiana recordation statute, that caused notice to be difficult if not impossible.***

Id. at 1169 (emphasis added). This is even more so in this litigation where the information in the claimed vesting document is only a name—no address, no date of birth, no social security number—and that document is more than 40 years old.

Second, similar to Bayou Bridge, in an effort to locate the landowners, NORA consulted telephone directories and conducted general internet searches on www.whitepages.com, www.infospace.com, www.yahoo.com, www.whowhere.com, www.switchboard.com, and www.anywho.com. *Id.* For one individual, none of these databases returned any results. For two individuals, one or more addresses turned up. Except for one letter received by Denise Augustine, however, the rest of the letters sent to these addresses were returned undeliverable/return to sender, attempted/unknown, and unclaimed. *Id.* at 1167. In addition, Denise Augustine never responded to the letter sent to her.

When NORA filed its expropriation lawsuit, it identified these individuals as absentee and asked the court to appoint a curator to represent their interests, which the court did. *Id.* In a petition to nullify the judgment that was ultimately rendered, these individuals "contend[ed] that NORA requested appoint of a curator before service was attempted by the sheriff, that NORA did not make a reasonable or diligent effort to locate and serve the plaintiffs, and that NORA made no effort to locate the plaintiffs after suit was filed." *Id.* Both the trial court and the appellate court rejected these complaints. The *Thomas* court found that NORA "made all reasonable efforts to ascertain the plaintiffs' respective addresses." The court also found that NORA was not required to attempt service that likely would have been a "vain and useless act" before appointment of the curator. *Id.* at 1170.

As this case demonstrates, Bayou Bridge acted in good faith and in accordance with the standards required under Louisiana law, and Larson-Wright's exception of prematurity should be overruled.

3. BAYOU BRIDGE'S PLEADINGS ARE SUFFICIENT.

Defendants' exceptions of vagueness and ambiguity are unsupportable and should be denied. "The purpose of the exception of vagueness is to place the defender on notice of the [n]ature of the facts sought to be proved so as to enable him generally to prepare his defense, as well as additionally by a formal pleading to identify the cause of action so as to bar its future re-

litigation after determination by the present suit." *Washington v. Flenniken Const.,* 188 So.2d 486 (La. App. 3 Cir. 1966). Bayou Bridge's Petition for Expropriation provides ample notice to Defendants of the nature of the facts sought to be proved so as to enable Defendants to generally prepare their defense. Further, Bayou Bridge's "Petition for Expropriation" leaves no doubt about the cause of action asserted.

In its Petition, Bayou Bridge alleges that it is a common carrier for hire engaged in the transportation of petroleum. Pet. ¶ 9. Bayou Bridge alleges that as a common carrier for hire, it has authority to expropriate under Louisiana law. Pet. ¶ 9. Bayou Bridge alleges facts demonstrating that it is exercising its expropriating authority for a public and necessary purpose. Pet. ¶ 8, 10.

Further, Bayou Bridge alleges that it intends to construct and operate a common carrier interstate liquid petroleum transmission pipeline, and the proposed pipeline crosses the Property. Pet. ¶ 8, 11. Bayou Bridge alleges that it "seeks to expropriate" a permanent and a temporary easement and describes with specificity the nature of the easement rights it seeks. Pet. ¶ 11, 12. Bayou Bridge describes the Property across which the permanent and temporary easement is sought *and* attaches as Exhibit D a certified plat depicting the precise location of the permanent and temporary easement sought. Pet. ¶ 7, Ex. D. Finally, Bayou Bridge alleges that it has negotiated in good faith with Defendant and has satisfied the statutory preconditions in Louisiana Revised Statute § 19:2.2. Pet. ¶ 15, 16.

There is simply no merit to Defendants' exception of vagueness and ambiguity, and the Court should overrule the exception.

4. DEFENDANTS' EXCEPTION OF PREMATURITY AS TO STATUTORY PREREQUISITES AND THE PERMITTING PROCESS ARE WITHOUT MERIT.

A. Bayou Bridge complied with all statutory prerequisites necessary to exercise its expropriating authority in this proceeding.

Before filing a petition for expropriation, a common carrier for hire entitled to expropriate pursuant to Louisiana Revised Statute § 19:2(8) must attempt in good faith to reach an agreement with the landowner and must provide to the landowner the information specified in Louisiana Revised Statute Section 19:2.2. Bayou Bridge met both of these preconditions before filing the Petition against Defendants.

First, Bayou Bridge attempted in good faith to reach agreements with the potential owners of the Property before filing this proceeding. "The test to be applied in determining

whether bona fide negotiations were conducted prior to suit is: Did condemnor make a 'good faith' attempt to acquire the property or rights by conventional agreement before the expropriation suit was filed?" *Dixie Pipeline Co. v. Barry*, 227 So.2d 1, 5 (La. App. 3rd Cir. 1969); *see also Trans. Gas Pipe Line Corp. v. 118 Acres of Land*, 745 F. Supp. 366, 369 (E.D. La. 1990) ("When evaluating whether a condemnor engaged in good faith negotiations, the central question is: "'Did the condemnor make a 'good faith' attempt to acquire the property or rights by conventional agreement before the expropriation suit was filed?'"); *Claiborne Electric Coop., Inc. v. Garrett*, 357 So.2d 1251, 1255 (La. App. 2d Cir. 1978) ("We hold there was a good faith attempt to acquire the rights of way by conventional agreement; plaintiff was not required to increase its original offer, nor change its proposed route at defendants' request."); *Dixie Electric Membership Corp. v. Watts*, 268 So.2d 128, 131 (La. App. 1st Cir. 1972) ("The requirement is met if there is evidence that the expropriating authority has made a bona fide effort to obtain the property by conventional agreement prior to filing suit.").

Bayou Bridge representatives began efforts to contact possible landowners with an interest in the Property in 2016 and these efforts continued through 2018. They spoke with hundreds of individuals and mailed hundreds of offer letters. As to Defendants, for example, Bayou Bridge mailed three certified offer letters to Ms. Larson-Wright, three certified offer letters to Ms. Aaslestad, and two certified offer letters to Mr. Aaslestad. Bayou Bridge offered, in some cases, 35 times more than the appraised value of the Property in an effort to obtain the property rights by conventional agreement.

As required by statute,[4] in March 2017, Bayou Bridge sent final offer letters by certified mail to the individuals potentially having an interest in the Property for whom it could find a last known address in the public record. Bayou Bridge sent Peter K. Aaslestad, Katherine Aaslestad Lambertson, and Theda Larson Wright final offer letters on March 8, 2018; March 7, 2018; and March 7, 2017; respectively. In those final offer letters, Bayou Bridge offered to compensate the individual in the amount that a Louisiana licensed appraiser determined was the fair market value of the servitude. The letters, which were sent more than 30 days before Bayou Bridge filed its Petition, included all the information necessary to comply with Louisiana Revised Statute Section 19:2.2 as follows:

[4] Bayou Bridge made its initial offers to Defendants in December 2016, prior to the revised Section 19:2.2 (B) going into effect. That section provides that the expropriator send a certain notice to the property owner after making its offer. Unlike Subsection (C), however, this provision is not a prerequisite to filing an expropriation proceeding and, regardless, was not in effect when Bayou Bridge made its initial offers to Defendants in 2016.

1. An appraisal as to the amount of compensation due to the Defendants for the full extent of their loss for the servitude sought. La. Rev. Stat. 19:2.2(A). The appraisal included the name, address, and qualifications of the persons preparing the appraisal, the amount of compensation estimated in the appraisal, and the methodology used in the appraisal. La. Rev. Stat. § 19:2.2 (A)(1)(a)-(c).

2. An offer to compensate the Defendants in a specific amount, which was the same amount that an appraiser determined was the fair market value of the servitude. La. Rev. Stat. § 19:2.2(A)(2).

3. The basis on which Bayou Bridge exercises its power to expropriate. La. Rev. Stat. § 19:2.2(C)(1).

4. The purpose, terms, and conditions of the proposed acquisition; the compensation to be paid for the rights sought to be acquired; a completed copy of all appraisals of, or including, the subject property; a plat by a Louisiana licensed surveyor that fairly identifies the proposed boundary and servitudes; a description and proposed location of any proposed above-ground facilities (not applicable); and a statement of considerations for the proposed route. La. Rev. Stat. § 19:2.2(C)(2)-(7).

Ms. Larson-Wright claims in her dilatory exception of prematurity that she never received the appraisal required by subsection (C). However, that is only because she apparently refused the certified mailing that was sent to her. The postal tracking information indicates that the letter was mailed to Ms. Larson-Wright on March 7, 2017, a notice was left for her regarding the letter on March 9, 2017, the letter remained "available for pick-up" in Silver City on March 14, 2017, and then was ultimately returned to Bayou Bridge on March 29, 2017 as "Unclaimed/Being Returned to Sender." *See* Exhibit 1. The statute requires only that Bayou Bridge mail the final offer letter to the landowner by certified mail to the landowner's last known address. Bayou Bridge complied with the statute.

Thus, as set forth above, Bayou Bridge has complied with statutory prerequisites for filing this proceeding against Defendants.

B. Challenges to Bayou Bridge's permits are not grounds to stop expropriation.

Defendants' counsel, along with other attorneys, have filed various lawsuits challenging the validity of permits issued to Bayou Bridge by state and federal agencies on behalf of various activist organizations. Based upon these lawsuits and what Defendants erroneously deem to be rulings calling into question the validity of these permits, Plaintiffs except to this expropriation on the grounds of prematurity. Depending on the outcome of these matters, Defendants hypothesize, Bayou Bridge may be unable to obtain the necessary permits, rendering this expropriation moot. Once again, Defendants fall short.

Bayou Bridge has discussed herein many of the requirements that it needs to satisfy in order to expropriate a servitude across the Property. First, Bayou Bridge must demonstrate that it is a common carrier pipeline company with the authority to expropriate private property. Bayou Bridge demonstrated satisfaction of these requirements herein. Next, pursuant to the Louisiana Constitution, Bayou Bridge must show that it is taking private property for a public and necessary purpose.[5] Finally, Bayou Bridge is required to satisfy certain statutory prerequisites set out in Title 19 of the Louisiana Revised Statutes. Defendants have questioned Bayou Bridge's compliance with some of these requirements, and Bayou Bridge has addressed its fulfillment of these obligations in this brief.

Moreover, Bayou Bridge already possesses the necessary permits to complete its work. However, even if it did not, Defendants are unable to direct the Court or Bayou Bridge to any condition, statutory or otherwise that states a common carrier pipeline must obtain all permits prior to any expropriation of property interests. In fact, courts should not impose restrictions beyond what is required legislatively or constitutionally, as explained by one Louisiana appellate court:

> Expropriation statutes are in derogation of the common right to own property and are to be construed strictly against the expropriator and liberally for the property owner. ***The mandate of strict construction, however, does not permit a court to add further restrictive conditions to those which are imposed constitutionally or legislatively. We do not find that it is clearly within the design of the law and certainly it is not expressly stated in any statute that restrictions other than those of legislative creation are to be placed upon the grant of the power to expropriate.***
>
> ***Where the law authorizes expropriation under specified conditions, courts should not add to those conditions.*** We find no Louisiana statute requiring that an expropriator have [a] FERC certificate of public convenience and necessity for expropriation and we shall not impose such a requirement.

So. Nat. Gas Co. v. Poland, Nos. 14219 to 14227, 384 So.2d 528, 530 (La. App. 2d 1980) (finding a FERC certificate unnecessary to proceed with expropriation) (emphasis added) (citations omitted). Likewise, this Court should not hold this expropriation hostage while these challenges to Bayou Bridge's permits run their course.

Moreover, it is important to note the decision of the courts in the "permit challenge" matters when confronted with similar requests to stay construction of the pipeline while the

[5] The Agreed Scheduling Order defers the consideration of the need for a public and necessary purpose to the hearing scheduled for November 27, 2018. Thus, Bayou Bridge will address this requirement in the brief submitted in advance of that hearing.

permit challenges continued. In each of those matters, the courts declined or reversed a decision that would stay Bayou Bridge's construction of the pipeline. In *Pastor Harry Joseph, Sr. v. Secretary, La. Dept. of Nat. Res.*, No. 38,163 (23rd Judicial District, St. James Parish), Judge Alvin Turner, Jr. remanded the matter back to the Louisiana Department of Natural Resources for further review, but declined to grant Plaintiff's request to stay construction. *See* Exhibit 2. In the other matter alluded to by Defendants, the United States Fifth Circuit Court of Appeals first stayed the district court's injunction of construction of the Bayou Bridge pipeline and later vacated the district court's preliminary injunction altogether and remanded for further proceedings. *See* Exhibits 3 & 4. Thus, as the courts reviewing the permits found no reason to delay construction, likewise, this Court should not postpone Bayou Bridge's exercise of its rights of eminent domain.

5. LOUISIANA'S EXPROPRIATION STATUTES ARE CONSTITUTIONAL.

Defendants purport to challenge the constitutionality of Louisiana's decades-old expropriation laws in their Affirmative Defenses. Defendants assert that Louisiana's expropriation laws (1) are an unconstitutional delegation of state power to private parties and (2) are unconstitutional because the state exercises no oversight or certification process over oil pipeline companies.[6] Defendants are both factually and legally incorrect.

First, the United States Supreme Court has soundly rejected the contention only state actors can permissibly exercise the power of eminent domain/expropriation for public purposes. *Kelo v. City of New London*, 545 U.S. 469 (2005). Indeed, the United States Supreme Court has determined that "[t]he public end may be as well or better served through an agency of private enterprise than through a department of government . . . ." *Id.* at 486; *see also New Orleans Redevelopment Auth. v. Johnson*, 2008-1020 (La. App. 4 Cir 7/8/09), 16 So.3d 569, 582 ("Historically, it has long been recognized that public purpose or even public use does not exclude private ownership.") (citation omitted). Therefore, the Defendants' First Affirmative Defense is without merit.

Moreover, federal courts have long deferred to legislative determinations of what constitutes proper exercise of eminent domain/expropriation authority so long as the elements of public use and just compensation are met. As the United States Supreme Court stated in *Kelo*: "Without exception, our cases have defined [public use] broadly, reflecting our longstanding

[6] Defendants' First through Third Affirmative Defenses.

policy of deference to legislative judgments in this field." *Id.* at 480; *see also Cameron Par. Police Jury v. All Taxpayers*, No. 17-55 (La. App. 3 Cir 02/21/17), 212 So.3d 663, 682 ("Courts give considerable deference to a legislature's determination of what constitutes a public purpose.").

In *City of Arlington v. Golddust Twins Realty Corp.*, 41 F.3d 960, 966 (5th Cir. 1994), the Fifth Circuit similarly stated: "We lack the authority to intrude into the legislative domain to invalidate an exercise of eminent domain power that so clearly falls within the constitutional limits of public use." Thus, "[w]here the legislature's purpose is legitimate and its means are not irrational," courts are not to engage in "empirical debates over the wisdom of takings." *Kelo*, 545 U.S. at 488. Thus, from a federal constitutional sense, this is the prerogative of the Louisiana legislature. Louisiana's constitutional and statutory expropriation laws related to common carrier pipelines reflect the legislature's legitimate purpose of growing its energy infrastructure and its means of achieving this purpose are not irrational.

The Louisiana legislature has long determined that development of public utilities, including the development of common carrier pipelines, serves a public purpose/use. For decades, the Louisiana Revised Statutes have included common carrier pipelines among the public utilities with the right of expropriation. *See* La. R.S. §§19:2(8), 45:251(1). Courts have long recognized the benefits common carrier pipelines provide to the public. In *Texas Pipe Line Co. v. Stein*, 190 So.2d 244 (La. App. 4th Cir. 1966),[7] for example, the court stated:

> It could hardly be argued seriously that a pipeline which distributed a product such as natural gas or fuel oil to 5,800 consumers in the general public from a single point of production would not be serving a public purpose. . . . The tremendous public benefits derived from the petroleum industry in the State of Louisiana are too well- known to warrant discussion. Perhaps no other resource is more important to the State's economy, and the public carrier pipelines which serve that industry are public utilities without which this all-important industry could not have been developed to its present significance. The public advantage resulting from an enlargement of the resources of the State, increasing available industrial energy and promoting the productive powers of a considerable number of citizens, was recognized by our Supreme Court as a contribution to the welfare and prosperity of the community, and was held to be sufficient proof of public purpose to justify the taking of private property by expropriation.

[7] This case was subsequently reversed and remanded as moot by the Louisiana Supreme Court because Texas Pipe Line built along another route while the matter was on appeal. *Tex. Pipe Line Co. v. Stein*, 202 So.2d 266, 267 (La. 1967) ("Clearly, the legal questions raised by the appeal are now moot. The pipe line has been completed on an alternate route, and plaintiff no longer needs the right of way across defendants' property for construction of the pipe line.")

Id. at 251 (citation omitted). That is no less true today as recently confirmed by the Louisiana Supreme Court in *ExxonMobil Pipeline Co. v. Union Pacific Railroad Co.*, No 2009-C-1629 (La. 03/16/10), 35 So.3d 192. In that case, the Court concluded that ExxonMobil's pipeline "delivers petroleum to end users, [which] redounds in benefits to the public at large." *Id.* at 199.

Finally, Defendants' own pleadings refute the contention in their Second and Third Affirmative Defenses that "there is no oversight over oil pipeline companies" in the determination of their route or the exercise of their expropriation authority. As referenced in Defendants' exceptions, and discussed further below, common carrier pipelines are required to adhere to legislatively-mandated statutory prerequisites before exercising their expropriation power. *See* La. R.S. § 19:2.2 (setting out multiple requirements that an expropriating authority must satisfy). Further, a pipeline's route selection is subject to judicial review and has been for many years. *Calcasieu-Cameron Hosp. Serv. Dist. v. Fontenot*, 93-148, (La. App. 3 Cir. Nov. 3, 1993) 628 So. 2d 75, 78-79 ("The standard is whether the expropriator, in selecting the location and extent of the property to be expropriated, acted in bad faith or so capriciously or arbitrarily that its action was without an adequate determining principle or was unreasoned.").

The very fact that this Court is hearing Defendants' challenges to Bayou Bridge's expropriation authority and must determine Bayou Bridge's right to expropriate contradicts Defendants' characterization of a lack of oversight. Second, Defendants discuss at length in their exceptions both federal *and* state permits that Bayou Bridge is required to apply for and obtain with respect to its route – the U.S. Army Corps of Engineers permit (the "Corps Permit") and the Louisiana Department of Natural Resources permit ("LDNR Permit"), both of which Bayou Bridge obtained over a lengthy process, collectively lasting approximately two years. Bayou Bridge's pipeline is further subject to regulatory scrutiny during construction and operation at the federal level by PHMSA (the Pipeline and Hazardous Material Safety Administration, under the U.S. Department of Transportation) and the Louisiana Department of Natural Resources, Office of Conservation, Pipeline Division. While the overseeing agencies may differ, all pipelines will be subjected to similar oversight and judicial scrutiny. Consequently, and in line with the governing law, Defendants' constitutionality arguments are without merit.

6. DEFENDANTS' DUE PROCESS CLAIMS SHOULD BE DISMISSED.

Defendants, as Plaintiffs-in-Reconvention, have asserted claims based on the Due Process and Takings Clause of the United States Constitution and the Due Process Clause of the

Louisiana Constitution. Bayou Bridge has excepted to these claims on the grounds that they are premature,[8] nor do they establish a cause of action.[9]

A. Federal Constitutional Claims

"[A] violation of the Fifth Amendment's Takings clause does not occur until plaintiffs have been denied just compensation through state procedures." *Tucker v. Par. of St. Bernard*, No. 09-8003, 2010 WL 3283093, 2010 U.S. Dist. LEXIS 84482 at *6-8 (E.D. La. Aug. 16, 2010) (citing *John Corp. v. City of Houston*, 214 F.3d 573, 581 (5th Cir. 2000)); *see also Williamson Co. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195, 105 S. Ct. 3108, 3121, 87 L. Ed. 2d 126 (1985) ("If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."); *Liberty Mut. Ins. Co. v. Louisiana Dep't of Ins.*, 62 F.3d 115, 117 (rejecting plaintiff's federal takings claim as unripe because plaintiff did not demonstrate that the state did not provide a compensation remedy). Determination of just compensation and payment of just compensation to Defendants who have or claim an interest in the Property is precisely the objective of Bayou Bridge's state court expropriation proceeding against Defendants/Plaintiffs-in-Reconvention. Defendants/Plaintiffs-in-Reconvention have no Fifth Amendment Takings or Due Process claim against Bayou Bridge because they will receive just compensation through the expropriation.

Further, Defendants/Plaintiffs-in-Reconvention's claim that property was taken before the expropriation concluded is also not cognizable under Fifth Amendment Takings or Due Process jurisprudence. "Under Louisiana law, the action for inverse condemnation 'provides a procedural remedy to a property owner seeking compensation for land already taken or damaged.'" *Tucker*, 2010 U.S. Dist. LEXIS at *6-8 (citing *Louisiana, through Dept. of Transp. & Dev. v. Chambers*, No. 91-C-1202 (La. 1992), 595 So.2d 598, 602). Defendants/Plaintiffs-in-Reconvention bear the burden of not only alleging deprivation of property, but also that an inverse condemnation action remedy would be futile. *See Liberty Mut.*, 62 F.2d at 117. They have not and cannot do so here. On the contrary, although not described as such, Defendants/Plaintiffs-in-Reconvention have alleged a claim for inverse condemnation in Count

[8] Bayou Bridge asserted a dilatory exception of prematurity, the function of which is to assert that a judicial cause of action does not yet exist because of some unmet prerequisite condition. *Hardee v. Atlantic Richfield*, 05-1207 (La. App. 3 Cir. 4/5/06), 926 So. 2d 739, 739. The action is premature when it is brought before the right to enforce it has accrued. *Id.*

[9] The peremptory exception of no cause of action is designed to test the legal sufficiency of a petition by determining whether a party is afforded a remedy in law based on the facts alleged in the pleading. *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, (La. 1993); 616 So.2d 1234, 1235.

IV of their Reconventional Demand in which they seek relief pursuant to Article I, Section 4 of the Louisiana Constitution. It is this provision of the Louisiana Constitution that gives rise to the inverse condemnation claim. *See State ex rel. Dep't of Highways v. Ellender,* 391 So.2d 1234, 1237 (La. Ct. App. 1980) (inverse condemnation based on La. Const. of 1921, art. I, §2 (now La. Const. art. I, §4)).

Because Plaintiffs-in-Reconvention cannot demonstrate that the state does not provide them a post-deprivation remedy, their federal due process claims fail as well. *See Liberty Mut.*, 62 F.3d at 118 ("The second claim, denial of procedural due process, fails with the [takings] claim. The procedural due process claim fails because Liberty Mutual has not demonstrated that Louisiana does not offer a post-deprivation remedy, as we have explained.").

Accordingly, Defendants/Plaintiffs-in-Reconvention's Fifth Amendment Takings and Due Process claims must be dismissed pursuant to Louisiana Code of Civil Procedure Article 927 because the facts pled in the Reconventional Demand do not give rise to Fifth Amendment Takings or Due Process claims. Further, any amendment to the Reconventional Demands would be futile because any Fifth Amendment Takings or Due Process claim would be premature given the pending expropriation proceeding. Therefore, these claims should also be dismissed pursuant to the exception of prematurity under Louisiana Code of Civil Procedure 926.

B. State Due Process Claim

Defendants/Plaintiffs-in-Reconvention's state due process rights are preserved by this proceeding, and therefore their due process claims fail as a matter of law. First, Bayou Bridge's expropriation action exists for the purpose of determining just compensation to those claiming an interest in the Property. Second, Defendants/Plaintiffs-in-Reconvention have asserted five separate causes of action against Bayou Bridge, including a claim for inverse condemnation for any alleged taking before the completion of the expropriation. Thus, Defendants/Plaintiffs-in-Reconvention are "not without a remedy," are actively pursuing remedies in this action, and therefore actually exercised their right to due process in this action. *See Jamie Land Co. v. Atwood*, 2006-2057 (La. App. 1 Cir 6/8/07); 965 So.2d 873, 877 (failure to provide constitutional notice of tax sale to owner did not violate state due process because owner was not without a remedy—cancellation of the sale—and exercised "its right to due process by bringing this action to quiet title the property").

Accordingly, Defendants/Plaintiffs-in-Reconvention's Due Process claim pursuant to Louisiana Constitution Article 1, Section 2 must be dismissed pursuant to Article 927 of the Louisiana Code of Civil Procedure. The facts pled in the Reconventional Demand do not give rise to state due process claims because Plaintiffs-in-Reconvention have and are pursuing remedies in this action, thereby exercising their rights to due process.

CONCLUSION

For the foregoing reasons, Bayou Bridge requests that the Court overrule Defendants' exceptions and sustain Bayou Bridge's exceptions and dismiss Defendants' claims based on the Due Process and Takings Clause of the United States Constitution and the Due Process Clause of the Louisiana Constitution.

Date: November 9, 2018

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2018, a true and correct copy of the foregoing has been forwarded to Defendants in this matter via US postal mail and/or email as follows:

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MICHAEL B. DONALD

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April 3, 2017, 8:38 am
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March 29, 2017, 11:50 pm
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Unclaimed/Being Returned to Sender
SILVER CITY, NM 88061

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SILVER CITY, NM 88061

March 9, 2017, 8:40 am
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March 9, 2017, 8:25 am
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SILVER CITY, NM 88061

March 9, 2017, 12:22 am
Arrived at USPS Regional Destination Facility
EL PASO TX DISTRIBUTION CENTER

March 7, 2017, 9:59 pm
Arrived at USPS Regional Origin Facility
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PASTOR HARRY JOSEPH, SR., GENEVIEVE BUTLER, H.E.L.P., THE GULF COAST RESTORATION NETWORK, THE ATCHAFALAYA BASINKEEPER, AND BOLD LOUISIANA

23rd JUDICIAL DISTRICT COURT

v. 38, 163 "E"

PARISH OF ST. JAMES

SECRETARY, LOUISIANA DEPT. OF NATURAL RESOURCES

STATE OF LOUISIANA

FILED

DEPUTY CLERK OF COURT

JUDGMENT

This matter came for hearing in open court on January 4, 2018, on the Plaintiffs' Petition for Judicial Review, which appeals the decision of the Louisiana Department of Natural Resources that issued Coastal Use Permit P20160166 to Intervenor, Bayou Bridge Pipeline, LLC.

Present in Court were the following:

Elizabeth Livingston de Calderon and Lisa W. Jordan, counsel for Plaintiffs; and Ryan Sundstrom and Talia Nimmer, student attorneys for Harry Joseph and Genevieve Butler;

Harry Vorhoff and Ryan Seidermann, counsel for Defendant, Louisiana Department of Natural Resources; and

James C. Percy and Nicole M. Duarte, counsel for Intervenor, Bayou Bridge Pipeline, L.L.C.

Considering the pleadings, briefs, arguments of counsel, the record of the Louisiana Department of Natural Resources, and the law, and for the written reasons assigned:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the Plaintiffs and against Defendant, Louisiana Department of Natural Resources and Intervenor, Bayou Bridge Pipeline, LLC.

IT IS FURTHER ORDERED, ADJUDED AND DECREED that the matter is remanded to the Louisiana Department of Natural Resources for further proceedings consistent with this Court's Reasons for Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs in this matter are assessed to, and shall be paid by, the Louisiana Department of Natural Resources and Bayou Bridge Pipeline, LLC.

Thus, done and signed this 15th day of May, 2018 in Gonzales, Louisiana.

Honorable Alvin Turner, Jr.
Division "E"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-30257

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

BAYOU BRIDGE PIPELINE, L.L.C.,

Intervenor Defendant - Appellant

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

Before DAVIS, CLEMENT, and OWEN, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

Before the court is Defendant-Appellant's motion for stay of the preliminary injunction pending appeal.

Having reviewed the arguments submitted in the briefing and at oral argument, and having considered the factors for a stay, *see Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410

(5th Cir. 2013), we determine that a stay is warranted. Defendant-Appellant is likely to succeed on the merits of its claim that the district court abused its discretion in granting a preliminary injunction. 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.

It is ORDERED that the request for a stay of the district court's extraordinary remedy pending appeal be GRANTED.

It is FURTHER ORDERED that the pending appeal be EXPEDITED to the next available oral argument panel.

OWEN, Circuit Judge, concurring:

I concur in granting a stay of the preliminary injunction pending appeal. However, it is not clear that additional briefing in the district court would remedy the United States Army Corps of Engineers' order granting a construction permit to Bayou Bridge Pipeline, L.L.C. (BBP) if the order is deficient because of a failure to provide adequate reasons for permitting BBP to purchase out-of-kind mitigation bank credits as a means of environmental mitigation. I nevertheless am persuaded that BBP has demonstrated a likelihood of success on the merits on appeal and that a stay of the preliminary injunction is warranted, provided that this court resolves this appeal on an expedited basis so that Atchafalaya Basinkeeper's challenges to the permit are not mooted by the completion of construction or irreparable alterations to the Atchafalaya Basin.

In assessing the likelihood of success on the merits of Atchafalaya Basinkeeper's contentions that the Corps had unlawfully issued the permit, the district court implicitly concluded that vacatur of the order granting the permit would be the proper remedy were the court to conclude, on the merits, that the Corps' order lacked adequate reasoning. Instead of vacating the permit, the district court could seek an additional or supplemental ruling from the Corps to address the lack of explanation that is of concern.

As the D.C. Circuit has recognized, "[a]n inadequately supported [agency action] . . . need not necessarily be vacated." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993). "[I]n deciding whether to vacate a flawed agency action, the district court should be guided by two principal factors: (1) 'the seriousness of the . . . deficiencies' of the action, that is, how likely it is 'the [agency] will be able to justify' its decision on remand; and (2) 'the disruptive consequences of vacatur.'" *Heartland Reg'l Med. Ctr. v.*

Sebelius, 566 F.3d 193, 197 (D.C. Cir. 2009) (quoting *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048-49 (D.C. Cir. 2002)). The Fifth Circuit has similarly held that an agency's failure to provide reasons supporting a determination does not necessarily require vacatur, stating that "[c]ourts have explained that 'remand is generally appropriate when "there is at least a serious possibility that the [agency] will be able to substantiate its decision" given an opportunity to do so, and when vacating would be "disruptive." ' " *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (quoting *Radio–Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999) (quoting *Allied-Signal, Inc.*, 988 F.2d at 151)). The district court could give the Corps the opportunity to provide any missing rationale regarding the mitigation credits without setting aside the order granting the permit to BBP. Given the familiarity that the Corps and other federal agencies have with the Atchafalaya Basin and the mitigation credit bank that was created specifically for the Basin, and given the Corps' defense of its order in the district court, BBP has shown a likelihood of success on the merits that the Corps will be able to substantiate its decision, given the opportunity to do so. BBP has also made a showing that halting ongoing construction of the pipeline is disruptive.

W. EUGENE DAVIS, Senior Circuit Judge, dissenting:

I respectfully dissent. I agree with the district court that the Section 404 Environmental Assessment ("EA") prepared by the U.S. Army Corps of Engineers (the "Corps") did not comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq., because it did not adequately explain how the proposed compensatory mitigation plan would reduce the impacts of the pipeline construction below a significant level. The district court held that the Corps did not explain how the bottomland hardwood credits Bayou Bridge Pipeline, LLC, proposed to purchase would mitigate the loss of function and services of the bald-cypress/tupelo swamp that Bayou Bridge planned to destroy.

The majority recognizes this deficiency but concludes that the Corps can provide a ready explanation for the substitution of out-of-kind bottomland hardwoods as compensation for destroying bald-cypress/tupelo swamp in the Atchafalaya Basin. This ready explanation was not provided to the district court or to us. That should be the end of the inquiry for this motions panel. I have found no authority allowing this motions panel to act other than to grant or deny the stay; moreover, it is beyond the authority of this panel to suggest that the district court require additional action by the Corps. That is particularly true here where Bayou Bridge neither requested this relief in the district court nor briefed this alternative to us.

When out-of-kind mitigation measures are chosen by the Corps, it must, at the very least, explain and document its basis for doing so in the administrative record.[1] That is, the Corps must explain how the out-of-kind mitigation measures replace the "lost functions and services" of the bald-

[1] *See* 33 C.F.R. § 332.3(e)(2).

cypress/tupelo swamp.[2] When this is not done, the Administrative Procedure Act (the "APA"), 5 U.S.C. § 500 et seq., requires that the Corps's action "shall . . . [be] set aside."[3] Instead of affirming the district court's grant of the relief the APA requires, the majority apparently hopes that the Corps can adequately explain this substitution if the district court remands to the Corps for that purpose.[4]

In permit cases where the merits panels of circuit courts have decided that further explanation by the Corps may fix the defects in the EA, the court has not vacated an injunction, but instead remanded to the district court to weigh the equities between remanding to the Corps and enjoining the work called for by the permit.[5]

My broader objection, noted above, is that this motions panel is preempting the merits panel's consideration of whether this path should be followed. In addition, even if we expedite the appeal of the preliminary injunction, Bayou Bridge's work in the basin will continue for another four to eight weeks and may very well moot out the appeal.

For these reasons, I would deny the emergency motion for stay.

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[2] *See id.* § 332.3(b)(1).

[3] 5 U.S.C. § 706(2)(a). The DC Circuit and others have recognized that remand without vacatur is appropriate in certain circumstances. *See, e.g., Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146 (D.C. Cir. 1993). However, vacatur is the ordinary remedy. *See, e.g., Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). In any event, the decision whether to remand with or without vacatur has only been undertaken by merits panels with a complete record before them. *See, e.g., Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 194–96 (D.C. Cir. 2009).

[4] *See* 5 U.S.C. § 706(2)(a).

[5] I have found no cases where a motions panel of a circuit court has reached out to engage in discussing a remand to the agency.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
July 6, 2018
Lyle W. Cayce
Clerk

No. 18-30257

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

Appeals from the United States District Court
for the Middle District of Louisiana

Before REAVLEY, JONES, and GRAVES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

The United States Army Corps of Engineers (the "Corps") and Bayou Bridge Pipeline, LLC ("Bayou Bridge," a convenience that includes co-appellant Stupp Brothers, Inc.), appeal the district court's grant of a preliminary injunction preventing Bayou Bridge from constructing a pipeline

in part through the Atchafalaya Basin of southern Louisiana. The injunction was based on the Corps' alleged failure to satisfy the demands of the National Environmental Policy Act in issuing a construction permit. Because the court misperceived the applicable regulations, and the Corps' analysis, properly understood, vindicates its decision that an Environmental Assessment sufficed under these circumstances, we vacate the preliminary injunction and remand to the district court.

BACKGROUND

On December 14, 2017, after a year-long review, the Corps issued Bayou Bridge a permit under Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, and Sections 10 and 14 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 403, 408, allowing it to build a 162-mile crude oil pipeline from Lake Charles, Louisiana to terminals near St. James. Portions of the pipeline will cross the Atchafalaya Basin, affecting wetlands. The discharge of dredge or fill material into these wetlands necessitated the Corps' permitting action under the Clean Water Act, 33 U.S.C. § 1311(a), while the Rivers and Harbors Act requires permitting for structures in or affecting "navigable waters" as defined by regulations.

In discharging its permit responsibilities, the Corps was required to implement the National Environmental Policy Act ("NEPA"), a procedural statute, which requires certain steps before federal agencies may approve projects that will affect the environment. To comply, the agency first prepares an environmental assessment ("EA"). *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 677 (5th Cir. 1992). As this court has held, "[a]n EA should be a 'concise public document . . . that serves to . . . [b]riefly provide sufficient evidence and analysis for determining whether to prepare an [environmental impact statement].'" *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 228 (5th Cir. 2007) (quoting 40 C.F.R. § 1508.9(a)). If the agency

finds during this process that the proposed action will result in "significant" effects to the environment, then it must also prepare an environmental impact statement ("EIS"). *Id.*; 42 U.S.C. § 4332(C). If the agency finds that the project will not have a significant impact, it will conclude with a "Finding of No Significant Impact" ("FONSI") and no EIS will be required. *Sabine River Auth.*, 951 F.2d at 677.

In this instance, the Corps authored two EAs, one under the Rivers and Harbors Act (the "408 EA"), and the other under Section 404 of the CWA (the "404 EA"). Based on those assessments, which together run over two hundred pages, plus appendices of nearly 200 pages more, the Corps determined that an EIS would not be necessary for this project and issued a FONSI.

Atchafalaya Basinkeeper and other organizations interested in 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 and Stupp Brothers intervened as defendants. The district court held an expedited hearing even before the complete administrative record could be filed. The court's decision, filed soon afterward, rejected a number of Appellees' contentions but found that Appellees had shown irreparable harm and had demonstrated a likelihood of success on the merits as well as other prerequisites of preliminary relief for two of their claims: (1) the EAs violated NEPA and the CWA by failing to adequately analyze mitigation for the loss of cypress-tupelo swamp along the pipeline right of way through the Basin, and (2) the EAs violated NEPA and the CWA by failing to adequately consider historical noncompliance by other pipelines and the cumulative effects of this project. The resulting preliminary injunction stopped construction only "within the Atchafalaya Basin."

Appellants sought a stay of the injunction pending appeal, which this court granted in a split decision.

Appellants raise a number of issues for review: that the district court applied an incorrect standard for determining injunctive relief; abused its discretion in finding Appellees likely to succeed on the merits and affirming the other bases for injunctive relief; and issued an improper and overbroad injunction. We need only rule on the court's errors in assessing the likelihood that Appellees will succeed on the merits.[1]

STANDARD OF REVIEW

A grant of a preliminary injunction is reviewed for abuse of discretion. *La Union Del Pueblo Entero v. FEMA*, 608 F.3d 217, 220 (5th Cir. 2010). Factual determinations within the preliminary injunction analysis are reviewed for clear error, and legal conclusions within the analysis are reviewed de novo. *Id.* A preliminary injunction is an extraordinary remedy. In addition to proving a likelihood of prevailing on the merits, the movant must demonstrate a substantial threat of irreparable injury if the injunction is not granted; the threatened injury outweighs any harm that will result to the non-movant if the injunction is granted; and the injunction will not disserve the public interest." *Id.* at 219. The district court abuses its discretion if it relies on clearly erroneous factual findings in deciding whether to grant a preliminary injunction or relies on "erroneous conclusions of law." *O'Reilly*, 477 F.3d at 238 (internal citations and quotations omitted).

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[1] In particular, the parties spar over whether the Supreme Court has determined that a "substantial likelihood of success on the merits" is invariably required for injunctive relief, thereby overruling some decisions that implied a "sliding scale" comparing the legal issues with the strength of the "irreparable harm" to the non-movant. *Compare Winter v. Nat. Res. Def. Counsel, Inc.*, 555 U.S. 7, 129 S. Ct. 365, (2008) *with Productos Carnic, S.A. v. Cent. Am. Beef & Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir. 1980)). Although the district court here first applied the sliding scale approach, it alternatively referenced the substantial likelihood of success requirement. Additionally, because the court's legal errors here, though no doubt inadvertent, are decisive, we need not wade into that debate.

The Corps' actions under the NEPA and CWA are subject to review under the Administrative Procedure Act ("APA"). As relevant here, a court will uphold an agency action unless it finds it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Coastal Conservation Assoc. v. U.S. Dep't of Commerce*, 846 F.3d 99, 110-11 (5th Cir. 2017). This is a demanding standard. The Supreme Court carefully explained factors that inform judicial review under this provision. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2866-67 (1983), and its words are worth repeating here:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

(citations omitted).

DISCUSSION

A. The district court decision.

The district court analyzed at length each of the Appellees' specific challenges to the procedural and substantive sufficiency of the EAs. The court rejected the complaint that the Corps' analysis of the environmental impact on the Basin of possible oil spills was insufficient and therefore arbitrary and capricious. The court also rejected the assertion that the Corps provided

defective public notice of the "type and location of the proposed mitigation" measures; as the court noted, the public comments, many of which were made by the Appellees here, were addressed and responded to by the Corps in 26 pages of the Section 404 EA.

The court then focused on specific impacts of this project in the Basin, i.e., that 455.5 acres of "jurisdictional wetlands" will be temporarily affected and approximately 142 acres of those wetlands "[will] be permanently converted from forested to herbaceous wetlands within the permanent right-of-way." The Section 404 EA states that "[t]he proposed project will change and/or reduce wetland functional quality along the proposed ROW by conversion of forested habitat types." The EA identifies "[a] key issue(s) of concern in this watershed is the loss of wetland function and value."

The court found three failures in the Corps' ultimate FONSI determination. First, the court acknowledged that "reliance on mitigation measures may reduce a project's impacts below the level of significance," quoting *O'Reilly*, 477 F.3d at 231, and the agency's reasoning "need not be laid out to the finest detail . . . ." However, "an EIS involving mitigation" may not be predicated on "mere perfunctory or conclusory language . . . ," quoting *O'Reilly*, 477 F.3d at 231-32. The court believed the Corps was perfunctory.

Second, the court accepted the Appellees' reading of the relevant CWA regulation, 33 C.F.R. §332.3, and concluded it does not "impos[e] a mechanical and rigid hierarchy" according to which out-of-kind mitigation credits within the watershed must be substituted for alternative in-kind mitigation alternatives. The court accordingly criticized the Corps' EAs for failing to discuss "how the mitigation choices serve[] the stated goal of 'replac[ing] lost functions and services;'" and failing to analyze in the Section 404 EA whether a 'preference' for mitigation bank credits was appropriate or whether the particular mitigation bank credits to be acquired are "located where it is most

likely to successfully replace lost functions and services." (quoting 33 C.F.R. § 332.3(b)(1)). The court found the 404 EA "devoid" of data analyzing the consequence of the "irretrievabl[e] los[s]" of 142 acres of cypress/tupelo swamp wetlands. Consequently, "there is not one iota of discussion, analysis, or explanation" how out-of-kind credits mitigate the loss of function of the cypress/tupelo swamp. The court also found "precious little analysis" of what "best practices" the Corps required for Bayou Bridge's construction will be and how they offset temporary impacts of construction within the Basin. For these basic reasons, the court determined that the FONSI for this project was arbitrary and capricious.

Third, the court also discussed Appellees' contention that because earlier pipeline projects through the Basin had created spoil banks and other detrimental conditions, the EAs did not properly address "cumulative impacts" of this project in terms of those defaults. The court agreed with Appellees' contention, referring to *O'Reilly*, 477 F.3d at 234-35, and 40 C.F.R. §§ 1508.7 and 1508.25. It concluded that Appellees had demonstrated a likelihood of success on the merits in showing the deficiency of the EAs.

Bearing in mind that the Corps' NEPA obligation was limited to discussing relevant factors and explaining its decision, not to reaching conclusions that this court or the district court approves, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S. Ct. 1835, 1846 (1989), we address each of these conclusions in turn.

B. FONSI versus "mitigated FONSI."

In its critical reliance on *O'Reilly*, the court misunderstood the difference between a "mitigated FONSI" at issue in that case and the Corps' FONSI here. The "mitigated FONSI" means that without mitigation, a project will have a "significant" environmental impact. 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, 3846 (Jan. 21, 2011). Here, however, after considering all the circumstances, including—importantly—measures imposed on Bayou Bridge to comply with the CWA, this project did not have a "significant" environmental impact.

In *O'Reilly*, by contrast, the impact of a housing development on adjacent wetlands was undisputable and irrevocable, yet the Corps utterly failed to discuss mitigation measures. *O'Reilly*, 477 F.3d at 232-34.[2] On their face, the 200+ pages in both EAs here acknowledged potential environmental impacts from the project, discussed third parties' concerns about those impacts, referenced in detail the hydrological, horticultural and wildlife environment in the affected acreage of the Basin, and explained how and where mitigation bank credits and construction protocols would be adopted to render the watershed impact not "significant." The court's misplaced view that the Corps issued a "mitigated FONSI" is an error of law that steered it in the wrong direction. Perhaps the Corps' discussion might have been improved with the addition of certain details, but the Corps' path could "reasonably be discerned" from the EAs and other publicly available documents and should have been upheld. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 US 644, 658, 127 S. Ct. 2518, 2530 (2007) (internal quotation marks omitted).

C. Application of out-of-kind mitigation credits.

Separate from the "mitigated FONSI" issue is the question whether the Corps properly applied CWA regulations when it determined that Bayou Bridge could (1) utilize approved construction methods within the Basin, and

[2] The Corps additionally points out that *O'Reilly* predates Council on Environmental Quality Regulations that constituted final guidance and clarifications about, inter alia, the appropriate use of mitigated FONSIs. 76 Fed. Reg. at 3843. Appellees have not directly challenged the Corps' adherence to this guidance.

(2) purchase (a) in-kind mitigation credits, i.e. cypress-tupelo acreage within the watershed and, when those were exhausted, (b) out-of-kind credits of bottomland hardwood acreage within the watershed to compensate for the project's impact.

When it concluded that the Corps did not sufficiently explain the need for or alternatives to out-of-kind mitigation credits, or the measures required to replace "lost aquatic functions and services" from this project, the district court misread the applicable regulation and failed to acknowledge its application by means of the Louisiana Wetland Rapid Assessment Method ("LRAM").[3] To explain these errors, we begin with the applicable CWA regulation, pursuant to which the Corps must require "compensatory mitigation" to "offset environmental losses resulting from unavoidable impacts to waters of the Unites States . . . ." 33 C.F.R. § 332.3(a)(1). Mitigation is required to compensate "for the aquatic resource functions that will be lost as a result of the permitted activity." *Id.* Criticizing the Corps' approval of out-of-kind mitigation, the district court stated that Section 332.3 does not "impos[e] a mechanical and rigid hierarchy" establishing a preference for out-of-kind mitigation. This was incorrect.

The first paragraph of the regulation states that, "in many cases, the environmentally preferable compensatory mitigation may be provided *through mitigation banks* or in-lieu fee programs because they usually involve consolidating compensatory mitigation projects where ecologically appropriate, consolidating resources, providing financial planning and

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[3] The court also clearly erred in stating that, "142 acres of wetlands . . . will be . . . irretrievably lost." According to the 404 EA, 142 acres will be converted from forested wetlands to scrub shrub wetlands and 78 of these acres will have previously been cypress/tupelo swamp (designated PFO2 in the LRAM tables). "Herbaceous wetlands" also provide important aquatic functions. Because there will be no filling of wetlands in this project, converting them to dry land, the Corps found no permanent loss of wetlands.

scientific expertise (which often is not practical for permittee-responsible compensatory mitigation projects), reducing temporal losses of functions, and reducing uncertainty over project success." § 332.3(a)(1) (emphasis added).

The next section of the regulation, describing "Type and location of compensatory mitigation," states that "[w]hen considering options for successfully providing the required compensatory mitigation, the district engineer *shall consider* the type and locations options *in the order presented in paragraphs (b)(2) through (b)(6) of this section.* In general, the required compensatory mitigation should be located within the same watershed as the impact site . . . ." § 332.3(b)(1) (emphasis added). The first listed option is "Mitigation bank credits," which then describes the reasons "the district engineer should give preference" to them; the reasons include the better scientific management, large scale, and financial security provided within mitigation banks. § 332.3(b)(2). Further, mitigation bank credits are preferred "[w]hen permitted impacts are located within the service area of an approved mitigation bank, and the bank has the appropriate number and resource type of credits available." *Id.*

The regulation next describes in detail the "Watershed approach to compensatory mitigation," § 332.3(c), among whose "Considerations" is that it "may include on-site compensatory mitigation, off-site compensatory mitigation (including mitigation banks or in-lieu fee programs), or a combination . . . ." § 332.3(c)(2)(iii). In regard to "Site selection," the regulation specifically authorizes district engineers to require "on-site, off-site, or a combination . . . [of] compensatory mitigation to replace permitted losses of aquatic resource functions and services." § 332.3(d)(2).

Once more, the regulation emphasizes that required "[m]itigation banks . . . may be used to compensate . . . in accordance with the *preference hierarchy in paragraph (b) of this section.*" § 332.3(g).

If this language does not set up a plain "hierarchy" strongly approving of mitigation banks—as opposed to the Appellants' proffered clean-up by Bayou Bridge of spoil banks created by other pipeline builders long ago—it is hard to know what would do. See also Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,594, 19,600, (April 10, 2008), referring to "hierarchy" in this regulation.

As for the district court's concern that the "hierarchy" would permit out-of-kind mitigation, i.e., allowing purchases of some bottomland hardwood credits within the Basin to mitigate the conversion of cypress/tupelo swamp to shrub scrub wetlands, the regulation says only this: "In general, in-kind mitigation is preferable to out-of-kind mitigation . . . . Thus, except as provided in paragraph (e)(2) of this section the required compensatory mitigation shall be of a similar type to the affected aquatic resource." § 332.3(e)(1). The critical exception then authorizes out-of-kind compensatory mitigation "[i]f the district engineer determines, using the watershed approach . . . that [it] will serve the aquatic resource needs of the watershed." § 332.3(e)(2). Further, "[t]he basis for authorization of out-of-kind compensatory mitigation must be documented in the administrative record for the permit action." *Id.*

In sum, the Corps was authorized to employ out-of-kind credits *within the same watershed* if they *serve the aquatic resource needs of the watershed* and if the Corps' reasoning is *documented in the administrative record.* § 332.3(e)(1), (2). That the out-of-kind credits here were within the watershed is not disputed. What is questioned is whether the Corps sufficiently documented how those credits serve the Basin's aquatic resource needs.

No doubt in part because the Appellees did not highlight the Corps' use of the LRAM methodology, the district court was not attuned to the agency's reasoning about out-of-kind credits. However, because that methodology is of

public record, and because its use forms a major portion of the 404 EA, we can review the Corps' decision within the proper administrative framework.

The LRAM is the type of "functional assessment" tool that the CWA regulation advises "should be used" to "determine how much compensatory mitigation is required." § 332.3(f)(1). Although LRAM is not a formal agency rule, it was published, subjected to comment by the public and numerous federal and Louisiana state agencies, and revised following their input. The LRAM states that its purpose is to "quantif[y] adverse impacts associated with permit applications and environmental benefits associated with compensatory mitigation" to determine the amount and type of credits necessary to offset a given impact. The LRAM consists of nearly 50 pages addressing all types of wetlands found in Louisiana, including bald cypress/tupelo swamp and bottomland hardwoods. It uses the prescribed "watershed approach," and it assigns a numerical value to wetlands that will be affected by a Corps permit. The value scores the "lost aquatic functions and services" and the acreage affected by the permit, and it identifies mitigation banks in the same watershed where credits can be purchased to offset any loss. Using scientific data and numerous references, the LRAM scores wetlands impact based on factors including (1) the number of acres affected by the prospective permitted project; (2) how difficult particular wetlands are to replace; (3) habitat condition; (4) hydrologic condition; (5) negative human influences; and (6) permanent, partial or temporary loss. The LRAM assigns values to the quality of the wetlands and of the mitigation banks, converts the values into credits, and determines on a watershed basis how many acres in mitigation banks must be purchased by the prospective permittee.

In general, the Supreme Court has held that the use of scientific methodology like that contained in the LRAM is subject to particular judicial deference. *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 377-78,

109 S. Ct. 1851, 1861 (1989). More specifically, the Sixth Circuit has held that the use of "structural proxies that rationally predict aquatic functionality" "requires the exercise of complex scientific judgment and deference to the Corps' expertise." *Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698, 713 (6th Cir. 2014). Not to defer to the LRAM would be an error by this court.

How the LRAM was utilized in the instant 404 EA is clearly referenced, if not fully explained in background, in twelve pages. Each of the eight watersheds crossed by this project is individually described, followed by a summary description of the mitigation bank credits required for each, followed by a summary chart for each watershed. Notably, although Appellees challenge only the requirement for out-of-kind mitigation bank purchases in the Atchafalaya Basin, they do not complain about similar out-of-kind credits that were also applied to the Terrebonne watershed.

That the LRAM analysis "rational[ly] connect[ed]" the out-of-kind mitigation bank purchases in the Basin to the "aquatic functions and services" lost by the project is all that was required either by the CWA regulation, by NEPA, or by the Supreme Court. *Motor Vehicle Mfrs.*, 463 U.S. at 43, 103 S. Ct. at 2866-67.

First, Bayou Bridge was required to buy bottomland hardwood credits within the Basin watershed only because it had already purchased all available cypress/tupelo swamp credits. The Corps was entitled to make this decision rather than revert to the less-preferred alternatives prescribed in the regulations.

Second, the Corps' responsibility under the CWA is to ensure the protection of aquatic functions and services, which does not include the protection of tree species as such. The LRAM, properly read and understood, measures and scales precisely the aquatic functions and services characteristic

of each type of Louisiana wetland and corresponding mitigation banks containing those wetlands. The scales differed for bottomland hardwoods and cypress/tupelo swamp on the basis of factors noted above. Appellees have not challenged the scientific validity of the LRAM-based analysis and calculations.

Third, as the 404 EA clearly states, "[t]he Louisiana Wetland Rapid Assessment Method was utilized to determine the acquisition of a total of 714.5 acres of suitable habitat credits, from approved mitigation banks within the watershed of impact." It was on the basis of the LRAM that the Corps determined how many acres Bayou Bridge was required to purchase from mitigation banks within the Basin. Whether bottomland hardwoods or cypress/tupelo, both mitigation banks constitute wetlands, and the Corps concluded that the required purchases made up for the temporary or permanent conversion from one type of wetland (bottomland hardwood or cypress/tupelo swamp) to scrub shrub wetland. And as has been mentioned, Appellees did not contest the out-of-kind mitigation used in part to compensate for wetland conversion in the Terrebonne watershed.

Fourth, citing Section 332.3(b)(2)-(6), the 404 EA's discussion of required compensatory mitigation bank purchases notes that the Corps' conclusion accords with "the preferred hierarchy as set forth by the USACE," i.e. in-basin, in-kind mitigation first; in-basin, out-of-kind second; etc.

Fifth, contrary to the district court's skepticism about the Corps' requirement of Best Management Practices during construction, the 404 EA concludes its analysis with the following description of "Other Mitigative Actions":

> (See Department of the Army permit Special Conditions.) The applicant has avoided and minimized impacts to wetlands through co-locating the proposed project with other utility ROW's, the use of horizontal directional drills, restrictions in construction ROW width in wetlands [from 100' to 75'], and restrictions in the width

> of permanently maintained ROW in wetlands [from 30' to 15']. These avoidance and minimization measures will result in avoided wetland impacts.

In addition to the foregoing measures, the 404 permit requires Bayou Bridge to "re-establis[h] pre-existing wetland contours and conditions immediately following project completion." The 404 EA also states that Bayou Bridge agreed to place its pipeline at a sufficient depth not to impede future spoil bank removal projects (from previous construction). Another permit condition warns that modification or adjustments to the pipeline as built may be required "to facilitate any future . . . hydrologic restoration projects." The project's permit may be modified or even revoked if Bayou Bridge fails to produce photographic evidence of compliance with the permit conditions.

Sixth, to the extent *O'Reilly* might be considered to require the Corps to discuss mitigation alternatives under NEPA (irrespective of the distinction between a FONSI and a "mitigated FONSI"), that case becomes readily distinguishable when viewed in light of these EAs. *O'Reilly* predated and thus did not involve the mitigation hierarchy and considerations set forth in 33 U.S.C. § 332.3. As Bayou Bridge points out, *O'Reilly* did not involve mitigation banks approved under Section 332.8, nor an LRAM-type functional assessment tool. This court's decision rested on the fact that the Corps supplied "only cursory detail as to what" mitigation measures were required or how they operated. *O'Reilly*, 477 F.3d at 234. In evaluating this project, the Corps conducted careful research; hewed to the governing regulations and the scientifically based LRAM tool; conditioned the permit in accordance with evolved best management practices; required purchases of acreage within mitigation banks that will provide the optimal replacement of lost aquatic functions and services; and produced two significantly reasoned EAs.

Finally, this explanation of the Corps' decision process is readily understood on the basis of the EAs, supplemented by the publicly available LRAM. That the district court's opinion did not express this understanding no doubt is partly attributable to its expedited judicial process, which pressed the parties' presentations and lacked the full administrative record. But regardless of these difficulties, the record suffices to supply a "rational connection" between the facts about the project and its CWA implications and the ultimate decision rendered. The Corps' decision was thus not "arbitrary and capricious."

D. Analysis of "cumulative impacts"

The district court asserted that the Corps "myopically" considered this project's impacts alone, and it found the EAs deficient for failing to evaluate the pipeline project's impact cumulatively with the effect of spoil banks left from past projects and an alleged history of noncompliance with prior Corps-approved permits. These criticisms misread the applicable statute and the EAs. Under NEPA, agencies must consider each "cumulative impact" of permitted actions, and that term is defined as "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." 40 C.F.R. § 1508.7 (emphasis added). Here, the EAs concluded that because of appropriate mitigation measures, in terms of construction conditions and limitations in the permit, and Bayou Bridge's purchase of compensatory mitigation bank acreage, there would be *no incremental impact*; hence, there could be no cumulative effects with regard to pre-existing spoil banks.

The 408 EA specifically acknowledged past, present and reasonably foreseeable future actions, including previous pipelines, and maintained its conclusion that there would be no adverse results from temporary discharges during this construction. The 404 EA states that the district commander

reviewed the 408 EA before coming to a finding of no significant impact. The 404 EA does discuss cumulative effects on the environment. It concluded that "through the efforts taken to avoid and minimize effects . . . and the mandatory implementation of a mitigation plan . . . permit issuance will not result in substantial direct, secondary or cumulative adverse impact on the aquatic environment."

Although the district court focused on the potential of the project for wetland alteration or loss, the EA states: "Resulting natural resource challenges and stresses include permanent loss of wetlands (*of which this project constitutes temporary or conversion impacts, not permanent wetland loss),* loss of wildlife habitat, and impacts to water quality. A key issue(s) of concern in this watershed is loss of wetland function and value." (emphasis added). Not only does this clearly signify no permanent wetland loss, but also, after explaining mitigation for temporary impacts, monitoring and mitigation bank purchases in accord with LRAM, the EA states: "Appropriate compensatory mitigation was purchased at these banks to *offset unavoidable impacts to wetlands that would result from permit issuance.*" (emphasis added). Finally, to recapitulate the permit conditions mentioned previously, Bayou Bridge's construction, according to the permit, will leave the smallest possible footprint and will in several ways be accomplished without hindering possible future efforts to remove old spoil banks left by prior construction. In addition, the Corps is authorized under the permit to require replanting of desirable native tree species and undertake additional compensatory mitigation, further remediation actions, and/or further monitoring if the initial mitigation proves inadequate.

The Corps' analysis is not "myopic" with respect to "cumulative impacts" from other projects in the past. Our sister circuit has held that a finding of no incremental impact relieves an agency of the necessity of extensive and

ultimately uninformative discussion of cumulative effects pursuant to this regulation. *See Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1140-41 (9th Cir. 2006); *Northern Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1082 (9th Cir. 2011); *cf. Louisiana Crawfish Producers Ass'n-West v. Rowan,* 463 F.3d 352, 359 (5th Cir. 2006) ("The fact that the area is suffering environmental losses is part of the past cumulative impacts study *but is not relevant to a finding of future impacts flowing from the project*") (emphasis added). The Corps acknowledged extrinsic past impacts on the Basin and explained how this permit will not only remediate the impacts of this project but will not interfere with further efforts to restore the watershed.

The court's concern about cumulative effects based on the alleged past noncompliance with Corps permit conditions is also misplaced. Not only did some of those projects predate the Clean Water Act, but Appellants' factual information undermines specific charges made by Appellees about certain permit holders. And in any event, the court's fear of insufficient Corps monitoring activity contravenes "the presumption that public officers discharge[] their duties according to law." *Chaney v. United States*, 406 F.2d 809, 813 (5th Cir. 1969). The treatment of "cumulative impacts" by the EAs was not deficient, much less arbitrary and capricious.

CONCLUSION

For the foregoing reasons, the EAs concerning this permit do not exhibit the Supreme Court's criteria for an "arbitrary and capricious" decision. The agency decision did not "rel[y] on factors which Congress has not intended it to consider, entirely fail[] to consider an important aspect of the problem, offer[] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43,

103 S. Ct. at 2867. Further, because the court misapplied applicable legal principles and inadvertently but critically overlooked the LRAM, its decision was an abuse of discretion. The preliminary injunction is **VACATED** and **REMANDED** for further proceedings.

REAVLEY, Circuit Judge, dissenting:

We have the law. To compensate for the destruction of environmentally protected wetlands, a permit must identify acreage apart that will protect the environment and compensate for what is destroyed. The administrative record must demonstrate how that decision was made, such that we uphold the decision not for its correctness but for its rational support.

The district judge carefully studied the justification here and saw that gaps exist without more than conclusions. Now, the circuit court skips over those gaps. I dissent and explain myself in two respects.

A. Out-of-Kind Mitigation and the Clean Water Act

The pipeline project will clear 262 acres of wetlands in the Atchafalaya Basin. That process will impact two resource types: cypress-tupelo swamp and bottomland-hardwood forest. In turn, the Corps applied its functional assessment tool (the Louisiana Rapid Assessment Method, or LRAM) and determined that the project's impact called for the purchase of 232.8 acres of cypress-tupelo swamp and 80 acres of bottomland-hardwood forest from mitigation banks. But in what the Corps labels an "unfortunate[]" turn of events, one of the chosen mitigation banks did not have the number of cypress-tupelo acres necessary to match a fully in-kind mitigation. So the Corps sanctioned instead the purchase of 69 cypress-tupelo acres and 243.8 bottomland-hardwood acres. In other words, the Corps offset cypress-tupelo harm with 69 in-kind cypress-tupelo acres and 163.8 out-of-kind bottomland-hardwood acres. The Corps thereby swapped each acre of unaccounted-for cypress tupelo with an acre of surplus bottomland hardwood—it treated the two resource types interchangeably.

Under the Clean Water Act and its corresponding regulations, before the Corps could order the above out-of-kind swap, it bore a duty to (1) determine

that such mitigation "will serve the aquatic resource needs of the watershed" and (2) so document that "basis for authorization . . . in the administrative record." 33 C.F.R. § 332.3(e)(2).

The court believes a satisfactory explanation lies in the Corps' LRAM tool. I disagree. The LRAM lacks a critical explanatory component and thereby leaves the Corps' out-of-kind mitigation unsubstantiated.

The court explains the LRAM's function as follows: "[T]he LRAM scores wetlands impact based on [various] factors . . . [and] assigns values to the quality of the wetlands and of the mitigation banks, converts the values into credits, and determines on a watershed basis how many acres in mitigation banks must be purchased by the prospective permittee." In elementary terms, the LRAM compares land to land (impact site to mitigation bank) and calculates a ratio that, when applied to impacted acres, produces a suggested quantity of mitigation acres.

However, the Corps still must accommodate another variable: resource *type*. The regulations prefer in-kind over out-of-kind mitigation precisely because different resource types supply different functions, or said another way, similar resource types are "most likely to compensate for the functions and services lost at the impact site." 33 C.F.R. § 332.3(e)(1). To that end, the LRAM identifies a laundry list of habitats and groups them into six resource categories: bottomland-hardwood forest, cypress-tupelo swamp, pine flatwoods-savanna, coastal prairie, fresh-intermediate marsh, and brackish-saline marsh. Each category encompasses habitats that either provide "similar wetland functions or naturally exist together as a community." The LRAM then highlights the presumption that "in-kind habitat replacement" will "assure similar functions and services that are lost at an impact site are gained at a mitigation site." Thus, when the Corps applies

in-kind mitigation to the LRAM's calculated acreage, there is no need to manipulate the end product because the Corps' path is self-explanatory—the ecological functions intrinsic to both parcels and resource types are fully documented on both sides of the mitigation equation.

But when the Corps substitutes on the back end a resource that is out of kind—defined by the LRAM as "a resource of a different structural and functional type from the impacted resource"—the LRAM can no longer rely on a presumption of like functions for like resources. How, then, does the LRAM go about accounting for the variation between the resource impacted on the front end and the one purchased on the back end? The LRAM's ratio itself does not factor in the resource type purchased on the back end. So, lest we assume that the LRAM's calculated acreage is entirely fungible across *all* resource types—something no party or the court goes so far as to suggest—there must be something else in the LRAM to translate impacts from one resource to another (in this case, to justify the one-to-one substitution of bottomland hardwood for cypress tupelo).

In that crucial respect, the LRAM is conspicuously silent. It mentions "out of kind" a single time: to define the term. Nowhere does the LRAM explain how to quantify impacts to one resource in terms of another, much less how cypress tupelo and bottomland hardwood—habitats of a "different structural and functional type"—can swap seamlessly for each other in terms of the basin's resource needs. As useful as it otherwise may be, the LRAM is simply not a tool for out-of-kind mitigation.

Nor does the Corps' Section 404 Environmental Assessment bridge the explanatory gap. There the Corps grounded its out-of-kind swap on the bare fact that "there [were] not enough [in-kind] credits available for purchase in the basin." But lack of in-kind credits, standing alone, says nothing of the

"resource needs" of the basin—the principal consideration that must accompany any order of out-of-kind mitigation. 33 C.F.R. § 332.3(e)(2).

The Corps did not meet its regulatory burden to explain out-of-kind mitigation in this case. From the administrative record, then, the Corps' "path may [not] reasonably be discerned." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (internal quotation marks omitted). The district court was therefore correct to enjoin construction.

B. Mitigated Versus Ambiguous Findings of No Significant Impact

Whatever the ultimate merits of the plaintiffs' claim under the National Environmental Policy Act, we ought to at least apply the right standard. I disagree with the court's decision to adopt various tiers of scrutiny between those so-called "mitigated Findings of No Significant Impact" (FONSIs) and those other FONSIs in which mitigation plays a prominent but facially ambiguous role.

In *O'Reilly v. United States Army Corps of Engineers*, 477 F.3d 225 (5th Cir. 2007), we held insufficient an Environmental Assessment "that fail[ed] to articulate how the mitigation measures will render the adverse effects insignificant." *Id.* at 227. The Corps argues, however, that *O'Reilly*'s scrutiny applies only to mitigated FONSIs, those in which an agency engages in a two-part finding: (1) project impacts alone would be significant but (2) with mitigation, the impacts are reduced to insignificance. This case, the Corps says, does not involve a mitigated FONSI because the agency considered the project impacts and mitigation *all at once* before issuing a single finding of no significant impact. The Corps draws its labels for this distinction from a 2011 guidance document. *See* 76 Fed. Reg. 3843, 3847–48. And the court appears to accept the Corps' distinction wholesale.

But that distinction is all form with no substance. *O'Reilly* stands for a fundamental proposition: When mitigation is a necessary part of a FONSI, the agency bears a duty to explain why the mitigation will be effective. 477 F.3d at 231–32. Thus framed, there are but two types of FONSIs under *O'Reilly*: (1) those in which mitigation is an integral part of the insignificant outcome and (2) those in which the mitigation is ultimately gratuitous—that is, when the impacts would be insignificant even without mitigation. There is no third option.

Of course, the manner in which an agency arrives at its FONSI can make the role of mitigation apparent on the face of the administrative record. When the agency issues a formal mitigated FONSI, we know for sure that mitigation was an integral piece. But, as here, when the Environmental Assessment lumps project impacts and mitigation into a single consideration with no further explication, the record obscures whether the impacts would have been significant absent the mitigation. All the same, these facially ambiguous assessments can involve necessary mitigation. And that is more than common sense talking; the Corps' own guidance document tells us that ambiguous assessments might well involve mitigation that "reduce[s] the projected impacts of agency actions to below a threshold of significance." 76 Fed. Reg. 3843, 3847. In such a case, there is zero substantive difference between a mitigated FONSI and a facially ambiguous one and, as a consequence, zero reason to treat the two any different.

So, the question becomes, was mitigation necessary to this project's insignificant impact? On the one hand, the Corps is unwilling to concede that mitigation was necessary to reduce the project's impact to insignificance. This despite the pages and pages of the Environmental Assessment detailing the hundreds of acres of shredded wetlands and corresponding compensatory

mitigation. *See* 33 C.F.R. § 320.4(r)(1) (explaining that compensatory mitigation is meant to rectify "*significant* resource losses") (emphasis added). Nonetheless, that must necessarily mean the project's impacts would be insignificant even without mitigation. But as it so happens, the Corps is unwilling to say that either. And therein lies the paradox—the ambiguous record here enables the Corps to tiptoe on a nonexistent fence between the only two realities: mitigation that matters and mitigation that does not.

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*.

I respectfully dissent.