

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

GEORGIA RIVER NETWORK and)
AMERICAN RIVERS,)
)
Plaintiffs,)
)
v.)
)
U.S. ARMY CORPS OF ENGINEERS; LT.)
GENERAL ROBERT L. VAN ANTWERP,)
U.S. Army Corps of Engineers; COLONEL)
JEFFREY M. HALL, U.S. Army Corps of)
Engineers, Savannah District; RUSSELL)
L. KAISER, U.S. Army Corps of Engineers,)
Savannah District,)
)
Defendants.)
_____)

Case No. _____

COMPLAINT

Plaintiffs Georgia River Network and American Rivers file this Complaint. Under Local Rule 3.2, Plaintiffs' Certificate of Interested Parties is attached as Exhibit 1.

NATURE OF ACTION

1. On May 28, 2010, the United States Army Corps of Engineers (Corps) issued Grady County Board of Commissioners (Grady County) a Clean Water Act permit (Permit) to construct a large fishing lake. In violation of the Clean Water Act (CWA), 33 U.S.C. §§ 1251 *et seq.*, the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, the Corps improperly

approved the Permit based on a flawed angler demand study, an inaccurate wetlands delineation, and an insufficient environmental analysis.

2. The Permit, issued under CWA Section 404, 33 U.S.C. § 1344, authorizes Grady County to impound Tired Creek, which is a significant tributary of the upper Ochlockonee River, a river that flows through southwest Georgia before passing into Florida and making its way to the Gulf of Mexico.

3. Without requiring Grady County to articulate a sufficient need and purpose for the lake as is required by Corps regulations, 33 C.F.R. § 320.4(a)(2)(i), the Corps authorized the construction of a large dam and 960-acre fishing lake that will require the impoundment of sections of Tired Creek and the flooding of more than 129 acres of wetlands and more than nine miles of streams. Permit at 1, attached as Exhibit 2.

4. From the first application it submitted to the Corps in 2005, the County had a clear purpose of creating an amenity lake to serve a residential and commercial development. This is evident from the County's first two applications for a Section 404 permit, which included this development as part of the County's plans. Both of these applications were rejected by the Corps.

5. During the application process, Grady County changed its mind at least five times as to why it wanted the lake. On the Corps' advice, the County decided in 2006 to change its amenity lake to a lake used solely for fishing. To justify the purpose and need for this fishing lake after the fact, the County then commissioned an angler demand study. The Corps made this study the centerpiece of its Permit rationale. *See* Case Document and Environmental Assessment dated May 10, 2010 (the EA) at 5.

6. This study purports to show that there is currently a deficit of 280,000 angler trips in the area and, unless Grady County builds better fishing facilities, this number could increase three-fold in the next twenty-five years. *See* EA at 11. The study is filled with obvious flaws which were ignored by the Corps in its review of the application. The Corps refused to take a hard look at this study even in the face of critical comments on the study from the United States Environmental Protection Agency (EPA) and the State of Georgia. Such a review by the Corps would have revealed the fundamental flaws in the study, namely that there is no unmet demand for fishing in Grady County.

7. Under the CWA, without a demonstrated need for the fishing lake, the Corps had no basis to grant the Permit, 33 C.F.R. § 320.4(a)(2)(i), and could not properly determine whether the benefits of the project outweighed the damage to the wetlands and streams. *See id.* § 320.4(b)(4).

8. Furthermore, without such a need, the Corps could not prepare an adequate alternatives analysis as required under the CWA, 40 C.F.R. § 230.10(a), and as required by NEPA. *See* 42 U.S.C. § 4332(2)(C).

9. The Corps has also violated the CWA by approving a wetlands delineation that underestimates the amount of wetlands that would be impacted by the impoundment. Despite the expressed reservations of both the EPA and the State of Georgia, the Corps improperly relied on the work of the County's wetlands consultant, a consultant who informed the County that he was trying to make the wetlands figure as small as possible. *See* Letter from Pope to County dated 8/27/02 at 1-2, attached as Exhibit 3. The Corps' final wetlands determination of 129 acres is a drastic departure from the 518 acres shown by the National Wetlands Inventory maps for the area.

10. The Corps has violated NEPA by failing to properly assess the direct and indirect environmental impacts associated with the fishing lake, especially the impacts of a reasonably foreseeable lakeside development that the County had included in its two earlier permit applications. The Corps also failed to consider the effects of other construction projects to move or replace roads and bridges that would otherwise be inundated by the lake.

11. Finally, the Corps failed to prepare an environmental impact statement (EIS). Considering the potential significant environmental impacts, as well as the controversial and precedential nature of this project, the Corps should not have relied simply on an environmental assessment (EA) and finding of no significant impact (FONSI). *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.27.

12. Because the Corps failed to comply with the requirements of the CWA and NEPA, its issuance of the Permit was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” under Section 706 of the APA. 5 U.S.C. § 706(2)(A).

JURISDICTION AND VENUE

13. Jurisdiction of this Court is invoked under 28 U.S.C. § 1331 (federal question); 28 U.S.C. §§ 1361, 2201, and 2202 (declaratory judgment); and the APA, 5 U.S.C. §§ 701-706.

14. Because Defendant Corps resides in Savannah, Georgia, venue is proper in this Court under 28 U.S.C. § 1391, 5 U.S.C. § 703, and S.D. Ga. Local Rule 2.1(e).

PARTIES AND STANDING

Plaintiffs

15. Plaintiff Georgia River Network is a Georgia non-profit membership organization with 663 individual members, 10 business members, and 36 water protection organization members. Its business office is located at 1090 South Milledge Avenue, Athens, Georgia 30605.

16. The primary goals of Georgia River Network are protecting and restoring rivers, streams, and wetlands throughout Georgia through education and public participation in policy decisions by government agencies. Georgia River Network helps people organize to protect and restore rivers and watersheds by building local watershed group capacity and providing statewide policy analysis. It actively supports and works to ensure effective implementation of environmental laws such as the CWA, including the use of litigation to achieve these goals.

17. Plaintiff American Rivers is a nonprofit conservation organization. It has more than 65,000 members nationwide. American Rivers' Georgia office is located in Decatur, Georgia. American Rivers protects and restores America's rivers for the benefit of people, wildlife, and nature. Through its work in four key program areas—River Restoration, River Protection, Clean Water, and Water Supply—American Rivers is working to protect our remaining natural heritage, undo the damage of the past and create a healthy future for our rivers and future generations. American Rivers' work includes the use of litigation to achieve these goals.

18. Georgia River Network and American Rivers have members in Grady County, Georgia, who use the site of the proposed lake and the waters downstream—including the

Ochlockonee River and its tributary Tired Creek—and are affected by the fishing lake.

Georgia River Network and American Rivers members use the Property for hiking, wildlife viewing, and bird watching, and use the downstream waters for canoeing, hiking, wildlife viewing, and aesthetic enjoyment.

19. Georgia River Network and American Rivers members' interests are directly and irreparably harmed by the Corps' violation of the CWA and NEPA as described in this Complaint. For example, one member enjoys hiking through forests and wetlands on the site of the proposed lake that would be inundated with water if the fishing lake were constructed. Georgia River Network and American Rivers members' use and enjoyment of the Property, Tired Creek, and the Ochlockonee River has been and will continue to be significantly and negatively affected by the Corps' issuance of the Permit.

20. Georgia River Network and American Rivers members are long-time residents and landowners in Grady County and care deeply about the fate of the site and the health of Tired Creek and the Ochlockonee River. For years, these members have worked to oppose the fishing lake and preserve the wetlands, streams, and forests on the Property for their enjoyment and the public's enjoyment. Members have attended public meetings, written letters to the editor criticizing the fishing lake, and created a citizen's group to mobilize public awareness and opposition to the project.

21. The Corps' issuance of the Permit has caused ongoing and threatened injury to the concrete and particularized interests of Georgia River Network and American Rivers and their members and the relief requested from this Court would redress those injuries.

22. The interests Georgia River Network and American Rivers seeks to protect by filing this suit are germane to their organizational purpose of protecting and restoring

rivers, streams, and wetlands and ensuring effective implementation of environmental laws. Neither the claims asserted nor the relief requested by Georgia River Network and American Rivers in this Complaint requires the participation of their individual members.

Defendants

23. Defendant Corps is a federal agency that had the duty of reviewing the application for the Permit to ensure the Permit that it issued complied with federal law, including the CWA, NEPA, and the APA.

24. Defendant Lt. General Robert L. Van Antwerp is the Chief of Engineers for the Corps and is the official ultimately responsible for actions taken by the Corps. Plaintiffs are suing Lt. General Van Antwerp in his official capacity.

25. Defendant Colonel Jeffrey M. Hall is the Commander of the Savannah District of the Corps and is the official responsible for actions taken by the Corps in the Savannah District. Plaintiffs are suing Colonel Hall in his official capacity.

26. Defendant Russell L. Kaiser is the Chief of the Regulatory Division for the Savannah District of the Corps and recommended that the Corps issue the Permit. Plaintiffs are suing Mr. Kaiser in his official capacity.

FEDERAL REGULATORY AND STATUTORY BACKGROUND

Clean Water Act

27. In 1972, Congress passed the Clean Water Act “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve this objective, Section 301 of the CWA prohibits “the discharge of any pollutant” into the navigable waters of the United States except in accordance with permits issued

under the CWA. *See id.* § 1311(a). “Pollutants” include dredged spoil, rock, dirt, and sand, among other materials. *Id.* § 1362(6).

28. Section 404 of the CWA authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material into “waters of the United States” when certain conditions are met. *Id.* § 1344. The Section 404 permitting program is administered by the Corps. Unless exempt under Section 404(f), all discharges of dredged or fill material into waters of the United States must be authorized under a Section 404 permit.

29. The term “waters of the United States” includes wetlands. The definition of “wetlands” used by the Corps and the EPA is as follows:

The term “wetlands” means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

33 C.F.R. § 328.3(b) (Corps); *see* 40 C.F.R. § 232.2 (EPA).

30. The Corps and the EPA use the 1987 Corps of Engineers Wetlands Delineation Manual to define wetlands for the purposes of the Section 404 permitting program. According to the 1987 Manual, there are three key parameters—vegetation, hydric soil, and wetland hydrology—that must be present in order for an area to qualify as a wetland. *See* U.S. Army Corps of Eng’rs, Wetlands Delineation Manual (1987), pt. II at ¶ 26.

31. Section 404 of the CWA places a non-discretionary duty on the Corps to regulate the dredging and filling of waters of the United States. *See* 33 U.S.C. §§ 1311(a), 1344. To fulfill this duty, the Corps must make reasoned wetlands determinations,

including properly asserting jurisdiction over waters of the United States. *See Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313, 315 (4th Cir. 1988).

32. In reviewing a Section 404 permit application, the Corps conducts a “Public Interest Review,” evaluating the “probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest.” 33 C.F.R. § 320.4(a)(1). The Corps’ public interest review includes a determination of the “relative extent of the public and private need for the proposed structure or work.” *Id.* § 320.4(a)(2)(i). No permit can be “granted which involves the alteration of wetlands identified as important . . . unless the district engineer concludes . . . that the benefits of the proposed alteration outweigh the damage to the wetlands resource.” *Id.* § 320.4(b)(4).

33. Additionally, the Corps must follow the rules developed by the EPA under Section 404(b) of the CWA, which are known as the “404(b)(1) Guidelines.” 33 U.S.C. § 1344(b). The 404(b)(1) Guidelines are codified in 40 C.F.R. part 230. The Corps is prohibited from issuing any permit unless there is “sufficient information to make a reasonable judgment whether the proposed discharge will comply with the Guidelines.” 40 C.F.R. § 230.12(a)(3)(iv); *see also* 30 C.F.R. § 320.4(a)(1).

34. Under the 404(b)(1) Guidelines, “no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.” 40 C.F.R. § 230.10(a). An alternative “is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of *overall project purpose*.” *Id.* § 230.10(a)(2) (emphasis added); 33 C.F.R. § 320.4(a)(2)(ii).

35. If the Corps concludes that there are no practicable alternatives to the proposed project that would have less adverse impacts to the environment, the Corps must ensure that “the discharge . . . include[s] all appropriate and practicable measures to minimize potential harm” 40 C.F.R. § 230.12(a)(3)(iii).

36. The Corps requires compensatory mitigation, which means the applicant must compensate for unavoidable adverse impacts after the applicant avoids and minimizes impacts. *See* Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1), 55 Fed. Reg. 9210 (Mar. 12, 1990) (the 1990 MOA). Compensatory mitigation is intended to “replace aquatic resource functions unavoidably lost or adversely affected by unauthorized activities.” Corps Regulatory Guidance Letter 02-2 at 1.

37. Compensatory mitigation under Section 404 has been clarified by the 1990 MOA and by Regulatory Guidance Letter (RGL) 02-2 issued in 2002. In 2008, these policies and guidance were incorporated into the Corps’ and EPA’s Compensatory Mitigation Rules, 33 C.F.R. § 332; 40 C.F.R. §§ 230.91 *et seq.* (the New Mitigation Rule), which now supplant past Corps and EPA guidance on mitigation.

38. Compensatory mitigation is achieved through the “restoration, enhancement, establishment, and in certain circumstances preservation” of wetlands. 33 C.F.R. §332.3(a)(2); RGL 02-2 at 4. Both the guidance and the rule provide that preservation of existing wetlands is the least favored of mitigation approaches, because it “does not result in a gain of wetland acres and [should be] used only in exceptional circumstances.” RGL 02-2 at 4. The New Mitigation Rule sets forth strict criteria that an applicant must satisfy to

use preservation as a means of mitigation—requiring that the applicant must show that “resources are under threat of destruction or adverse modifications” before preservation is allowed. 33 C.F.R. §332.3(h)(1)(iv).

39. As part of compensatory mitigation, the applicant must provide the Corps with acreage measurement or functional assessment of the wetlands being impacted by a project to determine the extent of impacts and the necessary mitigation required to mitigate loss of aquatic resource functions. 33 C.F.R. §332.3(f); RGL 02-2 at 2.

40. Additionally, the applicant must provide sufficient “baseline information” of the proposed mitigation sites that describes “acreage of wetlands, length and width of streams, elevations of existing hydrology, stream substrate and soil conditions, and timing of the mitigation.” RGL 02-2 at 8; *see also* 33 C.F.R. § 332.4(c)(5). Baseline information “should also include a delineation of waters of the United States on the proposed compensatory mitigation project site.” 33 C.F.R. § 332.4(c)(5).

41. Compensatory mitigation plans must also “contain written performance standards for assessing whether mitigation is achieving planned goals.” RGL 02-2 at 9; 33 U.S.C. §332.4(c)(9).

National Environmental Policy Act

42. Congress enacted NEPA to “promote efforts which will prevent or eliminate damages to the environment . . .” 42 U.S.C. § 4321. To achieve this goal, NEPA requires federal agencies to fully consider and disclose the environmental consequences of an agency action before proceeding with that action. *See id.* § 4332(2)(C).

43. To implement the requirements of NEPA, the Council of Environmental Quality (CEQ) promulgated regulations applicable to all federal agencies. *See* 40 C.F.R. §§ 1500-1508.

44. Since the Corps is the federal permitting agency for Section 404 permits, it has the primary responsibility for complying with NEPA requirements in connection with these permits. With regard to a permit proposal for a major project like Grady County's fishing lake, NEPA and CWA Section 404 are designed to work in tandem to result in an informed permit decision that maximizes the protection of the aquatic resources and the environment as a whole.

45. Under NEPA, the Corps must prepare an EA, which is an objective initial evaluation of the need for, the impacts of, and the potential alternatives to the proposed project. *See* 40 C.F.R. § 1508.9(3)(b). In the EA, the Corps must identify the direct, indirect, and cumulative effects of the proposed action and consider alternative actions and their impacts. *See* 40 C.F.R. § 1508.09.

46. NEPA's implementing regulations describe "effects" as "ecological . . . aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8(b).¹ Direct effects are those "which are caused by the action and occur at the same time and place." *Id.* § 1508.8(a). Indirect effects are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* § 1508.8(b). Indirect effects may include "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or

¹ NEPA's implementing regulations state that the terms "effects" and "impacts" are "used in these regulations synonymously." 40 C.F.R. § 1508.8(b).

growth rate, and related effects on air and water and other natural systems, including ecosystems.” *Id.*

47. Courts define “reasonably foreseeable” effects under NEPA as effects that are “sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision.” *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005)(citation omitted); *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1287 (1st Cir. 1996) (citation omitted).

48. NEPA also requires agencies to consider “alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. § 1508.9(b). The discussion of alternatives is intended to “provid[e] a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14.

49. Agencies must consider “[c]onnected actions,” “[c]umulative actions,” and “[s]imilar actions” together in an EA or EIS. *Id.* § 1508.25(a)(1)-(3). Actions are “connected actions” if they:

- a. “Automatically trigger other actions which may require environmental impact statements,”
- b. “Cannot or will not proceed unless other actions are taken previously or simultaneously,” or
- c. “Are interdependent parts of a larger action and depend on the larger action for their justification.”

Id. § 1508.25(a)(1)(i)-(iii).

50. Requiring agencies to assess “‘connected actions’ in a single EIS . . . prevent[s] agencies from minimizing the potential environmental consequences of a proposed action (and thus short-circuiting NEPA review) by segmenting or isolating an individual action that, by itself, may not have a significant environmental impact.” *Citizens’ Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1028 (10th Cir. 2002).

51. An EA provides the basis for an agency's determination whether to prepare an EIS or to prepare a FONSI. 40 C.F.R. § 1508.9(a)(1). If an agency determines that an EIS is not required and issues a FONSI, it must provide a "convincing statement of reasons why potential effects are insignificant." *Blue Mountain Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1996); *see also* 40 C.F.R. § 1508.13.

52. An agency cannot rely on mere "conclusory assertions that an activity will have only an insignificant impact on the environment." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005). Where potential environmental impacts are recognized, "some quantified or detailed information is required . . . [and] [w]ithout such information, neither the courts nor the public . . . can be assured that the [agency] provided the hard look that it is required to provide." *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.2d 1372, 1379 (9th Cir. 1998). The agency must demonstrate that it took the requisite "hard look" at the potential environmental impacts of a project, thereby justifying its action. *Hill v. Boy*, 144 F.3d 1446, 1450 (11th Cir. 1998)(quoting *Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66-67 (D.C. Cir.1987)).

53. An EIS is required for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. An agency determines whether the project "significantly" affects the environment by considering both the "context" and "intensity" of the impact. 40 C.F.R. § 1508.27. "Intensity" refers to the severity of the impact. *Id.* § 1508.27(b). In considering intensity, an agency considers up to ten factors enumerated by NEPA's regulations that shed light on the "significance" of the project. *Id.* § 1508.27(b)(1)-(10).

Administrative Procedure Act

54. The APA provides that “[a] person suffering a legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.

55. The APA provides that a court shall set aside agency “action, findings, and conclusions” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A).

56. The reviewing court must carefully “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). While the court need not substitute its judgment for that of the agency, it must nevertheless “make a substantial inquiry into the factors considered by the agency.” *Sierra Club v. Martin*, 992 F. Supp. 1448, 1466 (N.D. Ga. 1998), *rev’d on other grounds*, 168 F.3d 1 (11th Cir. 1999).

57. The Corps is a federal agency subject to the APA.

STATEMENT OF FACTS

The Property

58. The proposed site for the fishing lake is a 2,933.08-acre tract of land owned by Grady County (the Property) and located approximately three miles northwest of Cairo, Georgia. *See* August 2006 Alternatives Analysis at 2, 6.

59. The Property is a rolling natural area that is predominantly comprised of bottomland forests, wetlands, and streams. *See* EA at 90. In its central part, Black Creek,

Buss Creek, and Sapp Creek join to form the larger Tired Creek. *See* August 2006 Alternatives Analysis at 2.

60. The section of Tired Creek that is located on the Property is approximately twenty to twenty-five feet in width and ranges in depth from three to six feet deep. *See id.*

61. EPA describes the wetlands and streams impacted by the proposed lake as “aquatic resources of national importance.” Letter from EPA to Corps dated 10/11/06 at 4; Letter from EPA to Corps dated 1/7/10 at 1.

62. The Property is home to an abundance of wildlife and aquatic species. *See* EA at 82. Wildlife inhabiting the Property includes the bobcat, otter, southern flying squirrel, and white-tailed deer, as well as several species of bats. *Id.* Bird species include wild turkey, great blue heron, red shouldered hawks, and marsh hawks. *Id.* at 83. Fish species expected in Tired Creek include redbreast sunfish, pirate perch, warmouth, and mosquito fish. *Id.* A number of amphibians are also very common in the area. *Id.*

63. Since the 1930s both the federal and state governments have considered public recreation projects on the Property. After World War II, the Corps developed plans for a federal park on the property, which was later cancelled. *See* May 2005 Alternatives Analysis at 10, attached as Exhibit 4 (copy provided by Corps missing pages 6 to 8).

64. In 1973, the Grady County Recreation Commission deeded the property to the Georgia Department of Natural Resources (DNR) for the purpose of establishing the Tired Creek State Park. *Id.* The state park was never developed and, in 1994, the State conveyed the property back to Grady County. *Id.* Since then, the public has had the opportunity to explore and appreciate the natural area through the use of recreational permits.

65. Although both the federal government and State of Georgia have considered a lake project at times, both have decided, after extensive study, that such a project would be imprudent. *See* Memorandum from Howard Zeller to Leonard Ledbetter, dated 12/8/89, attached as Exhibit 5; *see also* Letter from Georgia Conservancy to Corps dated 10/12/06 (quoting Letter from DNR Commissioner Joe Tanner to Tom Purdue, Office of the Governor, dated 1/15/79).

66. In 1979, Georgia DNR Commissioner Joe Tanner questioned the utility of a fishing lake on the Property, stating “[w]e really question the need for a site that would be almost totally a water-based recreation resource so close (25 miles) to Lake Seminole, a recognized fishing and boating hot-spot where we already operate Seminole State Park In summary, we definitely question the feasibility of building the park at Tired Creek.” Georgia Conservancy Letter dated 10/12/06 at 9.

67. Additionally, in 1989, when Georgia DNR considered a fishing lake at the Property, EPA commented that such a lake “would have significant environmental impact and if the permit were issued by the Corps, [EPA] might veto [it].” Ex. 5, 12/8/89 DNR Memo at 2.

The Overall Project Purpose

68. In May 2005, Grady County applied for a Corps permit to construct a 1,225-acre amenity lake (the May 2005 Application).

69. During the course of the next five years, Grady County withdrew, modified and re-submitted its application on a number of occasions. Over this time and with the Corps’ guidance, Grady County changed the stated purpose for the lake five times, from a

1,225-acre amenity lake serving a residential and commercial development to a 960-acre fishing lake accommodating the County's purported unmet angler demand.

70. In Grady County's May 2005 Application, the 1,225-acre lake was to be the centerpiece of a master-planned community. *See* Land Use Study included in May 2005 Application (the May 2005 Land Use Study) and attached separately as Exhibit 6 (showing lake and surrounding development). Grady County's expressed goal was "to provide an economic development opportunity for Grady County." Ex. 4, May 2005 Alternatives Analysis at 2.

71. Specifically, Grady County stated the "overall project purpose" was to "impound a lake of sufficient size within a sufficiently large tract of land to develop a mixed use, water-based master planned community in order to promote economic development within Grady County, while also meeting a portion of recreational and leisure needs of the five-county area." *Id.* at 9.

72. The 1,225-acre lake was described as the "main amenity" (*id.* at 11) for the development that would offer "a variety of residential opportunities as well as a retail village, specialty retail resort, marina village, conference center, lodge, campsites, golf course with clubhouse, and a beach." *Id.* at 13; *see also* Ex. 6, May 2005 Land Use Study. According to Grady County, such a development was "dependent on a lake." *Id.* at 11.

73. The Corps had never permitted an amenity lake of this size, and doing so would have departed from the Corps' general policy against permitting large amenity lakes. *See* Memorandum for Commander "Clarification of Headquarters Guidance – Permitting of Recreational/Aesthetic Impoundments" dated June 8, 1993 at 3 (stating "impoundments that are proposed only for recreational and/or aesthetic purposes should generally not be

permitted when they are proposed in important wetlands and other important aquatic resources”)(emphasis omitted).

74. For this reason, the Corps proposed a different path. Based on meetings with the Corps, the County submitted a modified Section 404 application on November 18, 2005 (the November 2005 Application). *See* Letter from the County to Corps dated 8/16/06 at 1.

75. In the November 2005 Application, the design of the amenity lake remained the same including the master development surrounding the lake; however, the lake’s size had been reduced to 960 acres. *See* Land Use Plan included in the November 2005 Application (the November 2005 Land Use Plan) and attached separately as Exhibit 7.

76. The overall project purpose was now to “provide for the public fishing and water-oriented recreation needs of Grady County and the surrounding region *and also serve as a catalyst for economic development in Grady County through tourism and ancillary development.*” November 2005 Alternatives Analysis at 3 (emphasis added).

77. In April 2006, the Corps again instructed the County to revise its purpose for the lake, requesting that the County “should not include the mention of recreation or ancillary development.” Letter from County to Congressman Sanford Bishop dated 5/18/06 at 1, attached as Exhibit 8.

78. In an attempt to gain the Corps’ approval, Grady County again revised its “overall public purpose” in a letter to the Corps in August 2006. In this letter, the County rephrased the project purpose as follows: “To construct a lake of sufficient size that will provide for the present and future public fishing needs of Grady County and the surrounding region *and, incidentally, promote ancillary economic development.*” County Letter dated 8/16/06 at 2 (emphasis added).

79. A few weeks later on August 30, 2006, Grady County submitted a third and final Section 404 application for a purported “fishing lake.” *See* August 2006 Application.

80. The size and design of the newly proposed “fishing lake” remained the same as the 960-acre amenity lake in the November 2005 Application. *Compare* 2006 Fishing Lake Plan, attached as Exhibit 9 *with* Ex. 7, November 2005 Land Use Plan.

81. The areas that had been slated by the County as residential and commercial development areas in the November 2005 Land Use Plan, however, were relabeled “vegetative preserve” areas in the 2006 Fishing Lake Plan. Ex. 9, 2006 Fishing Lake Plan. But other than these new labels, there was nothing in the application that stated that these areas would in fact be “preserved.”

82. Notably, Grady County’s overall project purpose was entirely different than the previous two applications and omitted any economic development: “to construct a lake of sufficient size that will provide for the present and future public fishing needs of Grady County and the surrounding region.” August 2006 Application’s Alternative Analysis at 2.

83. Instead of an economic development justification for the 960-acre lake, Grady County submitted an “Analysis of Available and Future Angler Supply and Demand Opportunities” dated August 2006 and prepared by Dr. Michael Maceina, a fisheries biologist from Auburn University. *See* 2006 Angler Demand Study.

84. On September 13, 2006, the Corps published the Joint Public Notice (JPN). During the public comment period, the public, EPA, United State Fish and Wildlife Service (FWS), and Georgia DNR submitted comments skeptical of the County’s inexplicable change in course from an economic development project to lake used solely for fishing. *See, e.g.*, EPA Letter dated 10/11/06; Letter from FWS to Corps dated 10/20/06; Letter from

Georgia DNR to Corps dated 10/10/06; Letter from Georgia River Network to Corps dated 10/13/06; Georgia Conservancy Letter dated 10/12/06.

85. EPA, for example, questioned the need for the lake, stating “the fishing demand study seems to have limited relevance to the project purpose of supporting a reservoir of this specific size at this particular location.” EPA Letter dated 10/11/06 at 2. It was unclear to EPA “why fishing was selected as the only aquatic recreation activity to be included in the project purpose,” and it recommended that the “applicant should also provide additional information regarding the major change in project purpose.” *Id.*

86. In response to comments and upon the Corps’ request, Grady County submitted a revised “Analysis of Available and Future Angler Supply and Demand Opportunities” dated October 2007 and prepared by Dr. Michael Maceina. *See* 2007 Angler Demand Study. As part of his revision of the 2006 Angler Demand Study, Dr. Maceina’s 2007 Angler Demand Study determined the unmet fishing demand in Grady County alone.

87. Also in 2007, Grady County provided a revised fifth overall project purpose—focusing the lake’s purpose more on meeting Grady County’s fishing demand: “to construct a lake of sufficient size that will provide the present and future public fishing needs of Grady County while *supplementing* fishing opportunities for the surrounding region.” 2007 Alternatives Analysis at 3 (emphasis added).

88. The County revised its overall project purpose yet again in its May 29, 2009, Alternatives Analysis.

89. Finally, in the May 10, 2010, EA, the Corps defined the final overall project purpose to exclude satisfying the fishing demand of the region and instead limited the purpose to catering to the needs of Grady County. The Corps described the purpose as

follows: “the development of a sustainable public fishing area that would provide a variety of recreational fishing experiences to address the local unmet recreational fishing demands of current residents of Grady County and as much of the predicted demand of 2030, as possible.” EA at 5.

The Unsupported Need for the Project

90. In the end, guided by the Corps, Grady County changed its project purpose a total of 5 times during the course of the application process. The Corps then changed the project purpose again in the May 10, 2010, EA.

91. Grady County’s May 2005 and November 2005 Applications requested authorization to construct large amenity lakes. Yet, even after the County changed its project purpose to a “fishing lake,” it still maintains that it would need the same-sized large lake.

92. To justify the large lake, the County had the 2006 and 2007 Angler Demand Studies prepared, both of which were prepared after the County had submitted two applications seeking approval for an amenity lake 960 acres in size or greater. Without the Angler Demand Studies, the Corps could not have justified the purpose and need for the lake. Although the Corps did review the Angler Demand Studies, it did not *independently determine* whether either study justified the need for the proposed 960-acre lake. For example, the Corps never consulted any parks, recreation, and tourism management (or other) experts.

93. Considering that the proposed 960-acre lake would be the largest non-multi-use “fishing lake” in Georgia that has ever been permitted by the Corps, the Corps had a

duty to carefully scrutinize these studies which were the linchpin in the Corps' permit approval.

94. The next largest public fishing lake is the 357-acre Rocky Mountain Recreation & Public Fishing Area in Floyd County, Georgia, which is a "multiuse reservoir." EPA Letter dated 10/11/06 at 4; *see also* Letter from Corps to U.S. Army Research and Development Center dated 3/7/08 at 2. Unlike Rocky Mountain Lake, the Corps permitted the proposed lake strictly as a fishing lake.

95. EPA questioned the limited use of the lake in comparison to other large impoundments in Georgia, stating "we are unable to find any examples of similar impoundments of a comparable size Outside of large multipurpose impoundments like Lakes W.F. George, Seminole, and Blackshear, this would be one of the largest impoundments constructed in Georgia below the fall line." Letter from EPA to Corps dated 4/20/10 at 4.

96. The 2007 Angler Demand Study concluded that approximately 12,300 to 13,300 fishing trips would be needed to satisfy the 2010 Grady County angler deficit. EA at 5. They also concluded the 2030 unmet demand for fishing opportunities in Grady County's public water bodies would be 47,190 trips per year. *Id.*

97. After the EPA informed the Corps that there has been a twenty-percent decline in the number of fishing licenses issued in the United States, the Corps reduced the projected angler trip numbers to a 2010 deficit of 9,840 to 10,640 fishing trips per year and the 2030 deficit of 37,752 per year. EA at 5.

98. The Angler Demand Studies contain serious flaws which overestimate Grady County's unmet fishing demand. For example, the population estimates used are

inaccurate, and certain populations groups, such as toddlers, are assumed to fish at unrealistically high rates. Additionally, the study assumed Florida anglers would fish at the same rate in Georgia waters as Georgia anglers.

99. Despite these flaws, the Corps relied on the Angler Demand Studies to grant the Permit.

The Corps' Wetlands Jurisdictional Determination

100. When the Corps concluded that the site contained 129 acres of wetlands, it either disregarded or ignored the evidence that indicated the site contained many more wetlands.

101. The National Wetlands Inventory maps show that there are about 518 acres of wetlands within the impoundment area. Soils maps also suggest far more than 129 acres of wetlands are within the impoundment area.

102. In 2001, Grady County employed wetland consultants Douglas Pope and Ronald Lee to determine the extent of wetlands that would be impacted if the lake was constructed.

103. At the first meeting with Grady County, Mr. Pope stated that he and Mr. Lee “got the impression [from the County] to keep the wetland acreage as small as possible” Ex. 3, Pope Letter dated 8/27/02 at 1.

104. Because ground surveys of wetlands boundaries “would require much more time and expense,” Mr. Pope and Mr. Lee attempted to determine the amount of wetlands within the impoundment by using aerial photos, however, “they could not find the contrast on photos between wetland and upland that [they] had hoped for.” *Id.* Thus, they also used

“a few soil borings.” *Id.* From these limited observations they prepared a wetlands map. *Id.* at 4.

105. After preparation of a wetlands map, Mr. Pope and Mr. Lee met with Grady County again to discuss the wetland acreage. Mr. Pope describes the meeting as follows:

As we met with you and the county commissioners to update and discuss wetland acreage, as Ron and I recall, *we were encourage[d] to go back and see if less acreage could be found. We went back and looked at other ways to possibly reduce the wetland acreage.* On very few sites we figured estimated acreage, as this is the job for surveyors. On this site, a very short distance of wetland ribbon was placed along wetland and upland, not adequate for a surveyor to follow any distance.

We got the acreage down to 156 acres and how to mitigate the impact to [the] wetland area was developed and became part of the report.

Id. (emphasis added).

106. By letter of June 15, 2001, Tom Fisher, a Corps staff member, provided a preliminary confirmation of the 156-acres wetlands delineation. He requested that Grady County conduct a survey of the wetlands shown on the sketch. *See* Letter from Corps to County dated 6/15/01.

107. On November 15, 2001, Mr. Pope and Mr. Lee met with Mr. Fisher. *See* Ex. 3, Pope Letter dated 8/27/02 at 2. Mr. Fisher recommended that on streams which had uplands on both banks, they should “omit wetland and just classify as stream bank impacted.” *Id.* Mr. Pope explained how they reduced the original determination of 156 acres to 105 acres as follows:

In his office [Mr. Lee] and I used the map showing wetland[s] of 156 acres, and we made a decision where to end the wetland on each stream and [the] start [of each] stream bank. We figured the wetland area that remained came to 105 acres. Attached find the copy of the *sketch map we used to refigure the wetland acreage to the best of our ability without having a map showing the exact wetland line that would be prepared by a surveyor physically marking out the wetland.*

Id. (emphasis added); *see also* Mr. Pope's sketched map of 105-acre delineation (the Tired Creek Wetlands Map), separately attached as Exhibit 10.

108. Mr. Pope informed Grady County that they regretted that the "sketch map was used as being accurate and line marked on [the] ground" as it was "not to scale and [the] acreage of wetland was scaled, not measured." Ex. 3, Pope Letter dated 8/27/02 at 2.

109. Mr. Pope stated that the "wetland sketch map was not accurate" and therefore he recommended to "physically mark the line between the upland and wetland and have a survey made [which] will show more wetland acreage." *Id.* According to them, "[t]his would put to rest as to how much wetland and exactly where [sic] located, using the 1987 Field Guide for Wetland Delineation." *Id.*

110. Despite the Corps' 2001 request and Mr. Pope's recommendation to do so, Grady County never conducted a survey to verify the boundaries of wetlands on the site. Letter from Corps to County dated 7/20/06 at 2 (stating "[t]his requested wetland survey was never submitted by Grady County").

111. In 2004, the Corps found that the property was "delineated in accordance with the 1987 'Corps of Engineers Wetland Delineation Manual'" and that the "site contains 105 acres of wetlands." Letter from Corps to County dated 3/15/04.

112. Georgia DNR's environmental specialist and Section 401 Coordinator, Keith Parsons, conducted a site visit on January 27, 2005. Mr. Parsons alerted the Corps that Mr. Pope's sketched map of 105-acres "does not represent the full extent of all probable jurisdictional waters to be impacted by the project." Letter from Georgia DNR to Corps dated January 28, 2005 at 1.

113. Mr. Parson commented further that “*very significant acreages* of jurisdictional bottomland hardwood floodplain wetland systems with adjacent connectivity . . . do not appear on the current jurisdictional map” and that the total wetlands acreage on the site could “easily increase by 50 percent and possibly even double . . .” *Id.*

114. After receiving Grady County’s May 2005 Application, the Corps requested, for a second time, that the County provide “an onsite wetland delineation verification and a survey of the wetlands in the project area . . .” Letter from Corps to County dated 6/29/05.

115. Again Grady County ignored the Corps’ request to conduct a survey to verify Mr. Pope’s sketched wetlands map. *See* Letter from Corps to County dated 11/13/06 at 3 (recommending that the County conduct a survey).

116. A year later, Colonel Held, the Savannah District’s District Commander informed the County that the Corps was attempting to obtain infrared aerial photographs on which the County’s 105-acre wetland sketch was based. *Id.* The Corps, however, said it was willing to issue a JPN for the fishing lake including “Mr. Pope’s sketch as the best available information concerning the approximate[] location of wetlands.” *Id.*

117. In the same letter, Colonel Held stated that if additional wetlands are located during the permit process, and Mr. Pope was found to be in error, these additional wetlands must be delineated and “[a]ny resulting substantive change in project related wetlands impacts may result in the need to issue a new JPN.” *Id.* at 2.

118. The September 2006 JPN’s wetlands delineation received pointed criticism during the public comment period.

119. EPA noted that “at several interagency meetings, other agency officials that have been to the project site have expressed concern that there may be significantly more

wetland impact acreage than has been delineated[;]" however, the Corps' March 14, 2004 verification letter "does not help clarify the jurisdictional issue." EPA Letter dated 10/11/06 at 2. EPA also stated that "most Savannah District verification letters are much more detailed . . . and are based on more complete data." *Id.*

120. Georgia DNR attempted to convince the Corps that it had not identified all of the wetlands in the footprint of the proposed fishing lake by pointing out that (1) in 1989, when DNR was evaluating a then-proposed 240-acre recreational lake on Black Creek, it had found that the much smaller lake alone would have destroyed 150 acres of wetlands; and (2) the boundaries of the Black Creek lake would have fallen well within one of the arms of the proposed 960-acre Tired Creek fishing lake. DNR Letter dated 10/10/06 at 2.

121. Georgia DNR went on to note that Grady County's delineation "fails to provide any delineation data for the portion of the Black Creek where the original [DNR] fishing lake was proposed." DNR 10/10/06 at 2; *compare* DNR 1989 Environmental Assessment of Proposed DNR Fishing Lake, Figure 5-1, attached as Exhibit 11 (showing the 240-acre impoundment on Black Creek) *with* Ex. 10, Tired Creek Wetlands Map (showing minimal wetlands impact along Black Creek).

122. After the public comment period closed, the Corps again recommended that Grady County conduct an onsite survey flagging wetland boundaries and preparing "a meets and bounds survey of these boundaries." Corps Letter dated 11/13/06 at 3.

123. The Corps also stated that the JPN's wetlands diagram was based on photo-interpretive delineations maps with limited "ground truthing," and that "discrepancies may exist between a flagged/surveyed delineation and a photo-interpretive delineation, and this could delay permit processing due to the potential for a legal challenge." *Id.*

124. Grady County refused to follow the Corp's guidance recommending a field verification and, instead, accused the Corps of requiring it to "provide information that has not typically been required from similarly situated applicants." Letter from County to Corps dated 3/26/07 at 1.

125. Despite repeated requests from the Corps to do so, Grady County never conducted a survey to verify the boundaries of the wetlands its consultants had sketched on the site map. The County claimed it would be an "injustice" for the Corps to require anything more than what it had submitted. Letter from County to Corps dated 6/15/07 at 3.

126. On June 26, 2007, the County, Corps, and Georgia DNR conducted a site visit. Following this visit, the Corps added 26 acres of jurisdictional wetlands to what the Corps stated was "the 103 acres of previously identified wetlands." Letter from Corps to County dated 8/23/07. The record does not indicate on what basis the Corps determined the "previously identified" 103-acre total.

127. Georgia DNR, however, described the site visit as "limited in scope" and that it was conducted "during a period of historic drought conditions." Letter from DNR to Corps dated 7/9/07 at 2, 3. Georgia DNR informed the Corps that "there remains uncertainty as to whether the proposed protocol to base a final jurisdiction determination on photo interpretation with limited ground truthing will adequately capture the full reach of the jurisdiction." *Id.* at 3.

128. Georgia DNR stated, for example, that Sapp Creek flows approximately two miles from the Highway 112 Bridge to the confluence with Tired Creek, but the "survey covered less than one quarter of this distance and did not include the wetland area

identified in the Joint Public Notice approximately one mile from the highway bridge.” *Id.* at 2. DNR asserted that there was a “lack of identifiable markers and[/]or map locations” and “[i]t was not possible to reasonably locate our ground position in relation to a specific map or wetland feature.” *Id.* at 2. DNR concluded that the “inability of photo interpretation to pick up forested wetlands of 3 to 5 acres in size, lack of flagged or GPS points around known jurisdictional features, and lack of explanation as to discrepancies with earlier delineations continues to plague a final delineation determination.” *Id.* at 3.

129. Nevertheless, the Corps’ August 23, 2007, letter to the County served as the final jurisdictional verification of the 129 acres of wetlands. *See* Corps Letter dated 8/23/07.

The Mitigation Plan

130. To mitigate for the proposed stream and wetlands losses that would be caused by construction of the fishing lake, Grady County was obligated to develop a plan to mitigate these losses.

131. During the permit process, the County submitted at least four mitigation plans that were deemed insufficient by the Corps and state and federal agencies. *See* Plans dated May 2005, February 2006, November 2007, and July 2009.

132. When the Corps requested further documentation, Grady County stonewalled. For example, in response to the Corps’ request for functional assessments and wetlands delineations of proposed mitigation sites, the County stated that “it would be unfair to require it to furnish study reports and documentation not usually or customarily required of other applicants for similar projects.” County Letter dated 3/26/07 at 2.

133. Refusing up until the very end to provide information the Corps sought, Grady County submitted its final mitigation plan in November 2009 (the November 2009 Mitigation Plan).

134. EPA, FWS, and Georgia DNR remained highly critical of the County's final mitigation plan. The FWS's January 2010 comments are representative of these criticisms:

The Service has recommended denial of this permit due to an inadequate mitigation plan three times since December 2005. Over the last 4 years it appears that the applicant has made no significant revisions to the mitigation plan in order to meet any existing guidelines. Therefore we again recommend denial of this permit

Letter from FWS to Corps dated 1/7/10 at 2; *see also* EPA Letter dated 1/7/10 at 3 (“The revised [final] mitigation plan does not comply with the stated requirements and guidance,” and the “plan lacks detail and baseline data, and falls far short of an appropriate level of compensation for the project impacts.”).

135. These agencies argued that the mitigation plan—which is comprised of eight mitigation sites—is “highly fragmented” (EPA Letter dated 1/7/10 at 2) and “too highly speculative to provide adequate compensatory mitigation for the function loss of the Tired Creek watershed system.” FWS Letter dated 1/7/10 at 2; *see also* DNR Letter dated 12/22/09 at 1.

136. Similarly, EPA asserted that the mitigation plan is “mostly preservation actions at eight sites, of which only two abut.” EPA Letter dated 1/7/10 at 2. EPA continued that Grady County failed to “provide[] any data on which to base an assessment as to whether the preservation sites are worthy of being preserved and what the watershed scale threats are, if any.” *Id.*

137. The agencies also criticized the fact that three of the eight mitigation sites are on publicly-owned land under no threat of development or destruction. *See* DNR 12/22/09 Letter at 2 (stating “riparian preservation on publicly owned and protected property offers little effective mitigation where there are no demonstrated threats to the proposed properties”).

138. In response, Grady County asserted that there are no current legal protections on its *own* properties, and, therefore, they remain at risk of being developed. *See id.* at 34. Ultimately, the Corps did not require Grady County to show that the publicly-owned mitigation tracts are under any threat of development or modification. *Id.*

139. The agencies also requested that Grady County provide sufficient “baseline information” on each mitigation site. EPA informed the Corps that baseline information on the mitigation sites was necessary to determine the adequacy of the mitigation plan:

[Grady County] has not provided baseline vegetational data or hydrological data on the wetland mitigation areas, including preservation areas. These data are necessary to determine the current level of function and thus to be able to predict functional increase . . . and to set performance standards, including the antidegradation performance standard.

EPA Letter dated 1/7/10 at 2.

140. Georgia DNR informed the Corps that the mitigation plan was “vague in the extreme[,] providing little quantifiable baseline information or assessment for either the impacts or the mitigation tracts.” DNR 12/22/09 Letter at 1. The Corps responded that “baseline data is a requirement under the New Mitigation Rule, and this application is not subject to the Rule.” EA at 33.

141. Yet the Corps previously had required the County to comply with the New Mitigation Rule. In a September 24, 2009, letter, the Corps informed the County that it was

“completing a review of [the County’s] proposed compensatory mitigation plan pursuant to the requirements of . . . [the] New Mitigation Rule” Letter from Corps to County, dated 9/24/09 at 1.

142. The Corps further informed the County that aspects of its plan “do not fully comply with the Rule” and that the “mitigation plan for each of the proposed restoration, enhancement and preservation sites must also comply with the Rule.” *Id.* at 2.

143. Thus, in the final November 2009 Mitigation Plan Grady County states, “[t]his revision is based on the *Compensatory Mitigation for Losses of Aquatic Resources, Final Rule* issued on April 10, 2008” November 2009 Mitigation Plan at 3.

144. Agencies also criticized the County’s failure to provide wetlands delineations for each mitigation site. Delineation of each wetlands mitigation site is “critical to help verify the applicant’s assertion that a significant amount of mitigation areas are currently non-jurisdictional, but will be restored to fully functional wetlands.” EPA Letter dated 1/7/10 at 2; *see also* DNR Letter dated 12/22/09 at 1.

145. Even though the Corps had requested delineations of mitigation sites in August 2007 (Corps letter dated 8/23/07 at 3), the Corps responded that although the New Mitigation Rule required delineations for mitigation sites, the County’s application was submitted prior to the New Mitigation Rule’s effective date, and no delineations were required. *See* EA at 32.

146. In April 2010, EPA informed the Corps that the November 2009 Mitigation Plan was “essentially unchanged” since the Corps and the County received the agencies’ detailed comments on the Plan. EPA Letter dated 4/20/10 at 4.

147. In fact, the Corps did not require the County to make any substantive changes between the County's previous mitigation plan and the November 2009 Mitigation Plan.

148. Instead, the Corps included permit conditions to address these issues, which could be satisfied after the Corps' issuance of the Permit. *See, e.g.*, Ex. 2, Permit at 3, Condition No. 5 (requiring baseline data and work plans for each mitigation site); Condition 6 (requiring detailed monitoring plans); Condition No. 9 (requiring the County to provide sufficient information necessary for the Corps to evaluate each mitigation site's compliance with approved success criteria).

The Corps' Analysis of Direct Impacts

149. Although the Permit authorizes Grady County to fill and flood 48,370 linear feet of streams on the Property (Ex. 2, Permit at 1), the Corps concluded in the EA that the destruction of these streams "would have a minor adverse impact on fish species, which currently live in the streams being impounded by reducing the amount of stream habitat available." EA at 90.

150. The Corps further asserts that there will actually be an "overall benefit to fisheries" because the fishing lake will be "stocked and managed" and "would reduce the pressure currently placed on other lakes, ponds, and streams in the area." *Id.*

151. The Corps makes these unsubstantiated assertions without the benefit of a fish survey. *See* EA at 83. In addition to failing to conduct a fish survey of the Property's largest stream, Tired Creek, the Corps' direct impacts assessment provides no detailed information or quantitative assessment to support its conclusion that the destruction of over 9 miles of streams will have a "minor adverse impact" on local fish populations. *Id.* at 90.

152. The Corps' conclusion of an "overall benefit to fisheries" is not substantiated by the Corps, nor is the summary conclusion of an "overall benefit" a determination on the lake's *direct* effects on the local fish species. *Id.*

153. Likewise, the Corps' determination that the fishing lake will have a "negligible [e]ffect" on wildlife is without detailed information or analyses. *Id.*

154. Construction of the fishing lake will result in the flooding of 960 acres of "predominantly forested bottom land hardwoods" that are the habitat to a wide range of wildlife. *Id.*

155. The Corps states that a "large range of fauna resides in and visits the proposed reservoir site"—including white-tailed deer, gray fox, marsh rabbit, bobcat, gray squirrel, southern flying squirrel, mink, river otter, and beaver. *Id.* at 82.

156. The Corps attempts to support its "negligible effect" conclusion by stating that because a majority of Grady County is similar hardwood bottoms, upland pine forests, and farm land, "[i]t is expected that any wildlife displaced by the construction of the proposed project would relocate to similar habitats in the vicinity of the project." *Id.* at 90.

157. The Corps' analysis provides no individual species assessment and what the Corps does not reveal is that the vast majority of land in the vicinity of the Property is farmland that is unsuitable for the wildlife living on the wooded Property. The Corps does not consider whether there are adequate corridors for wildlife displaced by the fishing lake despite the fact that Grady County's natural areas are already highly fragmented and surrounded by farmland. See "Grady County Existing Land Use Map" in Grady County's Assessment Portion of the Ten-Year Comprehensive Plan at 30, excerpts attached as Exhibit 12.

158. The Corps provides no other information supporting its “negligible effect” determination.

The Corps’ Analysis of Indirect Impacts

159. As discussed below, the Corps failed to assess reasonably foreseeable impacts caused by the construction of the fishing lake—including (1) the effects of a foreseeable lake side residential and commercial development, (2) the effects of a development on adjacent private lands surrounding the County’s property as well as induced changes to infrastructure, and (3) indirect effects on historic and cultural sites.

a. The Corps’ Failure to Assess the Indirect Impacts of a Foreseeable Development Surrounding the Fishing Lake.

160. As discussed above, Grady County’s initial plan was to construct the proposed lake to serve a residential and commercial development.

161. It was only after the Corps declined to permit such an amenity lake that the County resorted to applying to the Corps for authority to construct a fishing lake.

162. Despite changing the project purpose to a fishing lake, Grady County did not change the size or shape of the lake. *Compare* Ex. 7, November 2005 Land Use Study Plan with Ex. 9, 2006 Fishing Lake Plan.

163. In response to the change in project purpose, Leon County, Florida, commented that Grady County changed the project purpose to a fishing lake with “no commitment from the County not to reverse course once the Permit is issued.” Letter from Leon County to Georgia DNR dated 10/9/07 at 2, attached as Exhibit 13.

164. Seeing that there was no proscription against building a residential and commercial development around the lake once the County obtained the permit from the Corps, the Georgia Conservancy recommended that the Corps place restrictions on

development of the natural areas surrounding the lake. *See Georgia Conservancy Letter dated 10/12/06 at 2.*

165. Specifically, the Georgia Conservancy stated, “[i]f the intended purpose is indeed a fishing lake, then the applicant should have no hesitancy in placing a permanent conservation easement on the rest of the property to keep it in its natural state and protect it for passive, recreational use.” *Id.*

166. Tall Timbers Research Station & Land Conservancy, another conservation group, commented that “[i]f approval by the [Corps] of this project as a ‘public fishing lake’ does not restrict future development on the remainder of the Tired Creek tract, then [Tall Timbers] recommends that the Corps evaluate this project based on the potential cumulative impacts that would result from what would essentially be a two-phase project (development of a public fishing lake in phase I and development of a residential community in phase II).” Letter from Tall Timbers to Corps dated 10/10/06 at 3.

167. EPA urged that the Corps include as a special condition to the Permit a requirement for “perpetual easements on the entire public park property . . . to protect the watershed of the proposed lake from development beyond the basic recreational facilities, such as picnic shelters, hiking trails, boat ramps, and camping facilities.” EPA Letter dated 4/20/10 at 5.

168. In response to the EPA’s perpetual easement recommendation, Grady County argued that easements on property surrounding other fishing lakes and reservoirs had not been imposed and that it did not feel that a “conservation easement is necessary to achieve water quality protection.” Letter from County to Corps dated 4/29/10 at 5.

169. After the public comment period, the Corps informed Grady County that “[i]n order to fully evaluate all impacts associated with the proposed project, we require a detailed land use plan for the publicly owned lands that would surround the project and any plans for private lands in the vicinity of the lake.” Corps Letter dated 11/13/06 at 4.

170. Again, in August 2007, the Corps requested information on “potential secondary environmental impacts that could result from a reasonably foreseeable recreational development of County owned upland areas surrounding the proposed lake.” Corps Letter dated 8/23/07 at 3.

171. In response to the Corps’ requests for information on a potential lakeside development, Grady County has avoided making any commitment to preserve the Property from future development.

172. Grady County stated that no indirect impacts analysis was necessary given “that there are no *current* plans” to develop the Property. EA at 17 (emphasis added).

173. Grady County also stated it has “no plans for a secondary development *at this time*; however, any future development occurring would have to be approved by the Board of Commissioners and obtain necessary county, state, and federal permits.” *Id.* at 20 (emphasis added).

174. Grady County further stated, “Any development or impacts outside the pool of the lake would require the necessary federal and state permits. *At this time* the proposed project is a single complete project.” *Id.* at 51 (emphasis added).

175. Finally, Grady County stated, “[i]f and when development is contemplated around the lake, a storm-water management plan would need to be developed and approved by the State and County.” *Id.* at 52 (emphasis added).

176. Grady County has yet to state that it will refrain from developing the natural areas surrounding the proposed lake.

177. Nearing the end of the permitting process, the Corps stated in a July 2009 letter to the County, “Grady County owns approximately 1,933 acres surrounding the proposed impoundment, *and has long-term non-specific plans for possible recreational or other development of that property in conjunction with the proposed fishing lake.*” Letter from Corps to County dated 7/30/09 at 1 (emphasis added).

178. The Corps also stated that “[a]ny project that provides recreational water opportunities may attract both residential and commercial developers” (EA at 96) and that “it is likely a lake this size would attract residential and/or commercial development on nearby lands located outside of the county owned property.” *Id.* at 86.

179. Yet the Corps did not consider the impacts of this foreseeable development in its permit decision.

180. Also, in the Permit the Corps did not require the County to put conservation easements or restrictive covenants on any areas of the Property surrounding the lake.

181. The only restriction of any kind that the Corps has imposed on the County regarding the uplands around the proposed lake is a 100-foot buffer. *See* Ex. 2, Permit at 5.

182. No other restriction in the Permit prevents the County from developing around the lake. *See generally* Ex. 2, Permit.

183. Recently Charles Renaud, Vice-Chairman of the Grady County Board of Commissioners, revealed just how foreseeable future development around the proposed lake is when he stated in a radio forum that a proposed aquatic center “could be built near the proposed lake at Tired Creek . . . [and that] *the 960-acre lake project brings with it many*

positive development possibilities, such as an RV center or marina.” Mesha C. Wind, *Commission Candidates Differ on Many Issues*, The Cairo Messenger, Sept. 29, 2010, A2, attached as Exhibit 14.

b. The Corps’ Failure to Assess the Indirect Impacts of “Likely” Development on Private Lands and Infrastructure Improvements.

184. The Corps believes that it is “likely” that the fishing lake “would attract residential and/or commercial development on nearby lands located outside of the county owned property.” EA at 86.

185. The Corps also anticipates changes in the road infrastructure in the area surrounding the Property. *See id.* at 97

186. Specifically, the Corps states that the fishing lake will increase the use of roads adjacent to the Property and that “increased road traffic will also increase the likelihood of more frequent infrastructure improvements for roads and utilities.” *Id.*

187. Also, the construction of the fishing lake would require realignment and extension of State Park Road and the replacement of bridges on Highway 112 and Gainous Road. *See JPN* at 1; EA at 97.

188. The Corps concludes that “[a]ll of these activities have the potential to result in further impacts to both developable uplands and aquatic habitats in the area.” EA at 97.

189. The Corps, however, conducted no assessment of the potential effects—including environmental, social, and aesthetic effects—of the “likely” development on lands adjacent to the Property and improvements to infrastructure induced by construction of the fishing lake. *Id.*

c. The Corps' Failure to Assess the Indirect Impacts on Historic and Cultural Sites.

190. The Corps informed Grady County that a historic and cultural sites survey “will be required for the entire project area; this includes the proposed lake site and all other properties owned by Grady County that are contiguous with the lake site.” Corps Letter dated 11/13/06 at 4.

191. The Corps also requested that the survey include any “indirect impact the proposed project may have on cultural resources that may be located near the project site, on adjacent private property.” *Id.*

192. Grady County’s historic sites survey “encompassed only the 960-acre footprint of the proposed lake.” Corps Memorandum dated 9/26/07.

193. Specifically, in a July 2009 letter to the Georgia Historic Preservation Division (HPD), the Corps states:

Grady County owns approximately 1,933 acres surrounding the proposed impoundment, and has long-term non-specific plans for possible recreational and other development of that property in conjunction with the proposed fishing lake. *No efforts have as yet been taken to identify historic properties within the larger surrounding tract.*

Letter from the Corps to Georgia HPD dated 7/30/09 at 1.

194. Despite its failure to conduct a survey of historic and cultural sites outside of the lake impoundment area, the Corps determined the project would have “minor adverse impacts to historical, archaeological, and architectural resources.” EA at 85.

195. The Corps failed to require Grady County to consider indirect impacts to historic and cultural sites on the County’s property *outside* of the lake impoundment area.

**The Corps' Segmentation of Impacts from the
Construction of Other Bridges and Roads**

196. The Corps' September 2006 JPN states that "[t]he proposed project would impact existing roads, which would require the following work: (1) realignment and extension of State Park Road, with Cedar Springs Road connecting to the extension; and (2) bridges on Highway 112 and Gainous Road would be replaced." JPN at 1.

197. The Corps did not consider these necessary construction projects part of the fishing lake project.

198. For example, the northeast portion of the proposed fishing lake would inundate the bridge over Sapp Creek on Highway 112, a major thoroughfare in the area. *See* Ex. 9, 2006 Fishing Lake Plan.

199. The Corps concludes that the construction of the fishing lake "would require raising the Highway 112 Sapp Creek Bridge and construction of an associated causeway." EA at 97; *see also* Randolph H. Wind, *Current DOT Officials Say Bridge Project Was Never Considered*, *The Cairo Messenger*, Sept. 22, 2010, A12, attached as Exhibit 15.

200. Yet the Corps failed to include the construction of the Sapp Creek Bridge and causeway, as well as the other road and bridge construction projects, as part of its permitting decision, even though their construction is necessary prior to the completion of the lake. *See* EA at 102.

The Corps' Finding of No Significant Impact

201. The proposed fishing lake has received continuing opposition from the EPA, FWS, and Georgia DNR since the Corps published the JPN on September 13, 2006. *See* Letters from EPA dated 10/11/06, 8/12/09, 1/7/10, and 4/20/10; *see also* Letters from

FWS to Corps dated 10/6/06 and 1/7/10; Georgia DNR Letters dated 10/10/06 and 12/22/09. These agencies have repeatedly questioned the need for the project.

202. A month before the Corps' issuance of the Permit, EPA expressed to the Corps that it "continues to have significant concerns about this project purpose, particularly regarding what the applicant considers a 'sufficient size', as well as, what has been modeled to be the current and future demand for Grady County." EPA Letter dated 4/20/10 at 2.

203. EPA informed the Corps that it was "currently gathering information to evaluate this project purpose, particularly as related to the fishing demand." *Id.*

204. EPA recommended that the Corps conduct an EIS with a "detailed evaluation of the Applicant's fishing needs models, and an assessment of the proposed project as it relates to the realistic fishing demand for Grady County and the immediate surrounding area." *Id.*

205. The Corps did not honor the EPA's request for a detailed analysis on the need for the fishing lake and, a month later, issued the Permit.

206. Given that it has determined the area is an aquatic resource of national importance and that the fishing lake is an unprecedented "three times the size of the largest [public fishing area] lake" in Georgia, EPA made three separate requests that the Corps conduct an EIS. *See* EPA Letters dated 10/11/06, 1/7/10, and 4/20/10.

207. There has been significant and ongoing controversy among the agencies over other aspects of the proposed fishing lake—including the Corps' determination of wetlands impacts of the proposed fishing lake and the Permit's proposed compensatory mitigation.

CLAIMS FOR RELIEF

Count I: The Corps Unlawfully Based its Permitting Decision on an Unsupported Need for the Fishing Lake in Violation of the CWA and the APA.

208. Paragraphs 1 through 207 are incorporated by reference.

209. The CWA requires that the Corps determine the “relative extent of the public and private need for the proposed structure or work.” 33 C.F.R § 320.4(a)(2)(i).

210. The Corps issued the Permit based on a fatally flawed angler demand study for Grady County, the 2007 Angler Demand Study. The Corps failed to independently verify the accuracy of the study on which it determined the need for the fishing lake. The study contains numerous obvious flaws, and the Corps’ blind reliance on this study resulted in the Corps’ erroneous determination of need for the 960-acre fishing lake.

211. Also, the Corps’ reliance on the flawed study prevented the Corps from determining whether “the benefits of the proposed alteration outweigh the damage to the wetlands resource.” *Id.* § 320.4(b)(4).

212. The Corps’ decision to issue the Permit without a justified need violates the CWA and the APA because it is arbitrary, capricious, and otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

Count II: The Corps Failed to Conduct an Adequate Alternatives Analysis in Violation of the CWA, NEPA, and the APA.

213. Paragraphs 1 through 212 are incorporated by reference.

214. The Corps cannot issue a Section 404 permit if a “practicable alternative” exists which would have “less adverse impact on the aquatic ecosystem.” 40 C.F.R. § 230.10(a).

215. Additionally, NEPA requires that the Corps consider “alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9(b)

216. The Corps’ reliance on the flawed 2007 Angler Demand Study resulted in an erroneous determination of need for the 960-acre fishing lake. The Corps’ analysis of alternatives centered on meeting this erroneous determination of need and therefore the Corps’ alternatives analysis is inherently distorted and inadequate.

217. The Corps failed to determine a “practicable alternative” which would have “less adverse impact on the aquatic ecosystem” under the CWA and has failed to adequately consider “alternatives to the proposed action” under NEPA. Accordingly, its decision to issue the Permit is arbitrary, capricious, and otherwise not in accordance with law in violation of the CWA, NEPA, and APA. 5 U.S.C. § 706(2)(A).

**Count III: The Corps Improperly Determined the Extent of Wetlands
of the United States in Violation of the CWA and the APA.**

218. Paragraphs 1 through 217 are incorporated by reference.

219. The County did not adequately determine the amount of waters of the United States that would be impacted by the construction of the proposed fishing lake. The Corps, having a duty to do so, failed to adequately verify the amount of wetlands at the site of the proposed fishing lake.

220. In so doing, the Corps either ignored or disregarded evidence suggesting much more than 129 acres of wetlands are located on the site.

221. Consequently, the Corps issued the Permit based on a jurisdictional delineation that underestimated the potential wetlands impacts on the site.

222. By issuing the Permit before ensuring that the wetlands on the site had been properly identified, the Corps failed to perform one of its non-discretionary duties under

the CWA's Sections 301 and 404, and its jurisdictional delineation of 129 acres was arbitrary, capricious, and otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A).

Count IV: The Corps Failed to Consider Adequately the Direct Effects of the Fishing Lake in Violation of NEPA and the APA.

223. Paragraphs 1 through 222 are incorporated by reference.

224. NEPA requires the Corps to take a "hard look" at the direct effects of a proposed action. *See* 42 U.S.C. § 4332; *Hill*, 144 F.3d at 1450.

225. The Corps' analysis of the fishing lake's direct effects on fish and wildlife on the Property is inadequate, is based on conclusory assertions, and lacks detailed information supporting its findings of "minor adverse effect" and "negligible effect."

226. By failing to adequately consider the direct effects on fish and wildlife, the Corps failed to take the necessary hard look required by NEPA, and the Corps' issuance of the Permit is arbitrary, capricious, and otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

Count V: The Corps Failed to Consider Adequately the Indirect Impacts of the Fishing Lake in Violation of NEPA and the APA.

227. Paragraphs 1 through 226 are incorporated by reference.

228. NEPA also requires the Corps to take a "hard look" at the indirect effects of proposed actions. *See* 42 U.S.C. § 4332; *Hill*, 144 F.3d at 1450.

229. Indirect effects are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). Indirect effects may include "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and

water and other natural systems, including ecosystems.” *Id.* Effects also include “historic,” “cultural,” and “social” impacts. *Id.*

230. Although Grady County had submitted two permit applications to the Corps for an amenity lake on the Property and refused to take actions to protect from development the surrounding natural areas on the Property after it reinvented the project as a fishing lake, the Corps failed to consider the reasonably foreseeable effects of a residential and commercial development surrounding the lake.

231. Despite the Corps’ recognition of the “likely” growth inducing effects of the fishing lake—including development on lands adjacent to the Property, increased traffic, and infrastructure improvement—the Corps failed to consider and analyze the fishing lake’s indirect effects.

232. Additionally, by limiting the “area of potential effects” on historic and cultural sites to only the lake’s footprint, the Corps failed to consider the fishing lake’s indirect effects on historic and cultural properties.

233. For these reasons, the Corps failed to take a hard look at the fishing lake’s indirect effects in violation of NEPA, and its actions are thus arbitrary, capricious, and otherwise not in accordance with law in violation of the APA. 5 U.S.C. § 706(2)(A).

Count VI: The Corps Impermissibly Segmented its Assessment of the Proposed Fishing Lake From Related Road and Bridge Construction Projects in Violation of NEPA and the APA.

234. Paragraphs 1 through 233 are incorporated by reference.

235. Under NEPA, the Corps must consider all “connected actions” in an EA or EIS. *See* 40 C.F.R. § 1508.25(a)(1).

236. Construction of the fishing lake requires the raising of the existing bridge on Highway 112 and the construction of a causeway, the construction of a bridge on Gainous Road, and the realignment and extension of State Park Road. All of these improvements will have to be completed prior to completion of the lake portion of the overall project.

237. These construction projects are therefore connected and interdependent parts of the proposed fishing lake project.

238. The Corps failed to assess the scope of work and the effects of the construction projects in its EA—including environmental effects such as the filling of Sapp Creek and adjacent wetlands, and non-environmental effects such as impacts on Highway 112 traffic.

239. The Corps impermissibly segmented these connected projects in violation of NEPA, and therefore the issuance of the Permit is arbitrary, capricious, and otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A).

**Count VII: The Corps Failed to Prepare
an EIS in Violation of NEPA and the APA.**

240. Paragraphs 1 through 239 are incorporated by reference

241. The Corps must prepare an EIS for all “major Federal Actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4.

242. The Permit authorizes the construction of an unprecedented 960-acre fishing lake resulting, at a minimum, in the destruction of 129 acres of wetlands and over 9 miles of streams that are part of an aquatic resource of national importance.

243. The unique characteristics of the area, the potential direct and indirect impacts of the proposed fishing lake, and the controversy and uncertainty surrounding the

proposed fishing lake make it an action “significantly affecting the quality of the human environment.” *Id.*

244. The Corps’ failure to prepare an EIS is arbitrary, capricious and otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that the Court:

- A. Enter a declaratory judgment stating that the Corps is in violation of the CWA, NEPA, and the APA as described above;
- B. Enter a declaratory judgment invalidating and vacating the Corps’ issuance of the Permit;
- C. Grant, in the Court’s discretion, Plaintiffs their costs of suit, including reasonable attorneys’ fees and expert witness fees; and
- D. Grant Plaintiffs such further and additional relief as the Court deems to be necessary and appropriate.

Respectfully submitted this 5th of November, 2010.

/s/ William W. Sapp
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