

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 12-60989-CIV-COHN/OTAZO-REYES

CITY OF DANIA BEACH, *et al.*,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS,

Defendant,

and

BROWARD COUNTY, FLORIDA,

Intervenor/Defendant.

**DEFENDANT U.S. ARMY CORPS OF ENGINEERS' CROSS MOTION FOR SUMMARY
JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant United States Army Corps of Engineers, through undersigned counsel, hereby move for summary judgment and oppose Plaintiffs' Motion for Summary Judgment. For the reasons set forth in the incorporated memorandum, there are no genuine issues of material fact in dispute, Plaintiffs are not entitled to judgment as a matter of law, and Defendants are entitled to judgment as a matter of law on all claims brought by Plaintiffs.

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**MEMORANDUM IN SUPPORT OF DEFENDANT U.S. ARMY CORPS OF ENGINEERS'
CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

Plaintiffs have been challenging the expansion of Fort Lauderdale-Hollywood International Airport ("FLL") for years, raising the very noise impacts they raise here since at least 2008. Literally hundreds of pages of the Environmental Impact Statement ("EIS") for this project are devoted specifically to noise impacts—including a discussion in the EIS's appendix responding to the very correlations between noise and health impacts Plaintiffs again raise. Yet despite their challenges' failure in the United States Court of Appeals for the District of Columbia, and again before this Court at the Preliminary Injunction ("PI") stage, Plaintiffs again seek to disrupt this vital project over previously-litigated issues and to flyspeck from the extensive environmental and public interest review conducted by the Federal Aviation Administration ("FAA"), the U.S. Army Corps of Engineers ("the Corps"), and other federal and state agencies.

Plaintiffs' narrow disagreements with the Corps' environmental review and determination to issue Permit No. SAJ-1995-04561 (IP-MJW) ("the Permit") entirely fail to demonstrate that the Corps acted arbitrarily and capriciously. The Court's prior findings of law at the PI stage control, as there have been no new factual or legal developments, and the Defendant is entitled to judgment as a matter of law.

I. STATEMENT OF THE FACTS

FLL is currently one of the busiest airports in the country, and it lacks sufficient capacity to accommodate existing and projected demand. AR 05149-72. Expansion of runways at FLL was first proposed in 1994, and environmental review under the National Environmental Policy Act ("NEPA") commenced in 1996. AR05124-25. As a "congested airport" under the Vision 100-Century of Aviation Reauthorization Act ("Vision 100 Act"), the FAA, as lead agency, undertook an environmental review in conjunction with the Corps and other federal agencies. AR 06128-29; AR 06331-33; A R05128; AR05171-72. 49 U.S.C. § 47171 *et seq.*

The Corps participated in the EIS process, deferring to FAA on matters of aviation, as required by law, and offering expertise on impacts to wetlands and other matters within the Corps'

jurisdiction. See, e.g., AR 00011-12; AR 00013-20; AR 00041-44; AR 06239; AR 06308; AR 06311; AR 06322; AR 06331-33; AR 21671. Dania Beach provided studies to the FAA regarding aviation noise and its potential health impacts as early as 2008. Am. Compl. ¶ 26 (ECF No. 41). FAA responded to these comments, along with many hundreds of others from Dania Beach and other parties. See AR 03799-4660; AR 04702-05031. After approximately thirteen years of ongoing environmental review, the FAA released the final environmental impact statement (“FEIS”) and thereafter the Record of Decision (“ROD”). AR 00048-6221; AR 06232-823.

Dania Beach challenged this ROD in the Court of Appeals for the District of Columbia, arguing that FAA’s determination was arbitrary and capricious and that FAA should have selected a different runway expansion alternative. The Court of Appeals upheld the FAA’s decision. City of Dania Beach v. F.A.A., 628 F.3d 581 (D.C. Cir. 2010); AR 13198-226.

Broward County then applied for a permit to fill approximately 8.87 acres of wetlands for the expansion of Runway 9R/27L at FLL. AR 10822-13197. The Corps provided the first public notice for Permit Application No. SAJ-1995-04561 (IP-MJW) on March 1, 2011 (the “Public Notice”). AR 13365-89. On March 29, 2011, in response to the First Public Notice, Plaintiffs’ counsel submitted to the Corps a six page letter, AR 16834-39, and enclosed over three thousand pages of materials. AR 13611-16833. Though the public comment period was scheduled to close on March 31, 2011, the Corps extended the comment period for an additional two weeks. During the extended public comment period, Plaintiffs’ counsel sent another letter to the Corps, enclosing the same noise related articles and studies previously provided to the FAA in January 2008, as well as a 2011 World Health Organization report on noise (“WHO Report”). AR 17464-845. The Corps directed these comments to the FAA who responded that noise impacts were adequately analyzed using FAA’s accepted methodology, and would be significantly mitigated through the ongoing noise abatement programs. AR 21330. On May 31, 2011, the Corps issued a second public notice, AR 19488-19524, and extended the public comment period for an additional 30 days. AR 19494. In July 2011, the FAA prepared a Written Re-Evaluation of the FEIS, AR 19934-20065, and again addressed noise impacts and mitigation; Plaintiffs did not challenge this Re-evaluation.

The Corps then issued its Memorandum for Record/Environmental Assessment (“MFR/EA”), AR 21664-737, and shortly thereafter, the permit at issue here. AR 21745-89. Plaintiffs unsuccessfully sought a PI, alleging the Corps’ discussion of noise impacts was insufficient under NEPA and alleging the availability of another practicable alternative that they believe could have been considered. The Court denied the Plaintiffs’ PI, and Plaintiffs have now moved for summary judgment. Pls.’ Mem. in Support of Mot. for Summ. J. (“Pls.’ Mem.”) (ECF No. 53).

II. STATUTORY PROVISIONS

A. National Environmental Policy Act (“NEPA”)

NEPA “does not mandate particular results, but simply prescribes the necessary process.” Ctr. for Biological Diversity v. Animal & Plant Health Inspection Serv., 10-14175-CIV, 2011 WL 4737405, at *2 (S.D. Fla. Oct. 6, 2011) (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989)); Sierra Club v. Van Antwerp, 526 F.3d 1353, 1360 (11th Cir. 2008).

NEPA requires a federal agency to prepare an environmental impact statement (“EIS”) detailing the environmental impacts of every “major Federal action[] significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). The EIS must describe the environmental impacts of the proposed action, any adverse environmental impacts of the proposed action that cannot be avoided, and alternatives to the proposed action which were considered by the agency. Id.; see also Robertson, 490 U.S. at 349. Agencies “[s]hall prepare supplements to either draft or final environmental impact statements if ... [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1); Marsh v. Or. Natural Res. Council, 490 U.S. 360, 372 (1989); Fla. Keys Citizens Coal., Inc. v. U.S. Army Corps of Eng’rs, 374 F. Supp. 2d 1116, 1144-45 (S.D. Fla. 2005) (quotation omitted) (emphasis in original) (new information “must present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.”).

B. Clean Water Act (“CWA”)

The Clean Water Act of 1972, 33 U.S.C. § 1251 et seq. (“CWA”) establishes a comprehensive program designed to “restor[e] and maintain[] the chemical, physical, and biological integrity of [the] Nation’s waters.” Id. § 1251(a). To achieve this goal, the CWA prohibits the

discharge of pollutants, including dredged or fill material, into navigable waters unless authorized by a CWA permit. *Id.* § 1311(a). The Act defines “navigable waters” as “waters of the United States,” which, in turn, is defined by regulation to include certain wetlands. *Id.* §§ 1362(7); 1328.3(a), (b).

Section 404 of the CWA authorizes the Secretary of the Army through the Corps to regulate discharges of dredged and fill material into waters of the United States through the issuance of permits. 33 U.S.C. § 1344. Individual permits are issued on a case-by-case basis after extensive site-specific documentation and review, opportunity for public hearing, public interest review, and a formal determination. *See generally* 33 C.F.R. pts. 323, 325. Section 404(b)(1) of the CWA provides that each individual permit shall be based on the guidelines developed by the Administrator of the Environmental Protection Agency (“EPA”), in conjunction with the Corps (the “Section 404 Guidelines”). 33 U.S.C. § 1344(b). The Section 404 Guidelines establish substantive environmental criteria to be assessed in reviewing section 404 permit applications and require the Corps to select the least environmentally damaging practicable alternative. *See* 40 C.F.R. pt. 230.

C. Vision 100-Century of Aviation Reauthorization Act (“Vision 100 Act”)

In 2003, Congress amended the Airport and Airway Improvement Act, 49 U.S.C. § 47101 *et seq.* (“AAIA”), to direct FAA to expedite and accord the highest possible priority to the environmental review of any project enhancing capacity at a “congested airport.” *Id.* §§ 47171-47175. The Vision 100 Act also directs FAA to ensure that environmental reviews by federal agencies “be conducted concurrently, to the maximum extent practicable.” *Id.* § 47171(a)(2). The Vision 100 Act also establishes a process by which the FAA will be lead agency, and requires a coordinating agency to give “substantial deference” to “the aviation expertise of the [FAA].” *Id.* § 47171(h).

D. Review under the Administrative Procedure Act (“APA”)

Claims brought under the CWA and NEPA are evaluated under the standard found in section 10 of the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* (“APA”), which provides that “[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .”

Id. § 706(2)(A); see Marsh, 490 U.S. at 375-76; Van Antwerp, 526 F.3d at 1360; N. Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1538-39 (11th Cir. 1990).

“The arbitrary and capricious standard is exceedingly deferential,” and the court is “not authorized to substitute [its] judgment for the agency’s as long as [the agency’s] conclusions are rational.” Miccosukee Tribe of Indians of Fla. v. United States, 566 F.3d 1257, 1264–65 (11th Cir. 2009) (internal marks and citation omitted); see Leal v. Sec’y, U.S. Dep’t of Health and Human Servs., 620 F.3d 1280, 1282 (11th Cir. 2010) (internal marks omitted). This standard “requires substantial deference to the agency, not only when reviewing decisions like . . . how much discussion to include on each topic, and how much data is necessary to fully address each issue.” Van Antwerp, 526 F.3d at 1361 (criticizing and vacating district court decision invalidating Corps action based on mere disagreement with Corps’ conclusion rather than on finding that Corps’ actions were arbitrary and capricious).

Given this narrow scope of permissible judicial review, the only role for a court called upon to determine compliance with NEPA is “to insure that the agency has taken a ‘hard look’ at environmental consequences; it cannot ‘interject itself within the area of discretion of the executive as to the choice of the action to be taken.’” Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) (quoting Natural Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972)). “An agency has met its ‘hard look’ requirement if it has ‘examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.’” Sierra Club v. U.S. Army Corps of Eng’rs, 295 F.3d 1209, 1216 (11th Cir. 2002) (quotation omitted). And an agency’s decision may only be overturned as arbitrary and capricious under “hard look” review if the court finds that “(1) the decision does not rely on the factors that Congress intended the agency to consider; (2) the agency failed entirely to consider an important aspect of the problem; (3) the agency offers an explanation which runs counter to the evidence; or (4) the decision is so implausible that it cannot be the result of differing viewpoints or the result of agency expertise.” Id.

The burden of showing that the Corps’ decisions were arbitrary and capricious rests squarely on Plaintiffs. Druid Hills Civic Ass’n, Inc. v. Fed. Highway Admin., 772 F.2d 700, 709 n.9 (11th

Cir. 1985) (citing Sierra Club v. Callaway, 499 F.2d 982, 992 (5th Cir. 1974) (other citations omitted)); Citizens for Smart Growth v. Peters, 716 F. Supp. 2d 1215, 1221 (S.D. Fla. 2010).

III. STANDARD OF REVIEW FOR A MOTION FOR SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56, “summary judgment is appropriate where there ‘is no genuine issue as to any material fact’ and the moving party is ‘entitled to a judgment as a matter of law.’” See Alabama v. N. Carolina, 130 S. Ct. 2295, 2308 (2010) (quoting Fed. R. Civ. P. 56(a)). At the summary judgment stage, the Court must view the evidence in the light most favorable to the nonmovant, see Adickes v. S.H. Kress & Co., 398 U.S. 144, 158–59 (1970), and it may not weigh conflicting evidence to resolve disputed factual issues, see Skop v. City of Atlanta, Ga., 485 F.3d 1130, 1140 (11th Cir. 2007). Yet, the existence of some factual disputes between litigants will not defeat an otherwise properly grounded summary judgment motion; “the requirement is that there be no *genuine* issue of *material* fact.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (emphasis in original). Further, where the record as a whole could not lead a rational trier of fact to find in the nonmovant's favor, there is no genuine issue of fact for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Here, the Court has previously ruled on Plaintiffs’ Motion for a Preliminary Injunction. If, as Defendant proffers, there have been no factual or legal developments that would alter the analysis in the Court’s opinion denying that motion, it is appropriate to adopt the Courts’ earlier conclusions as law of the case. See PK Labs, Inc. v. Ashcroft, 338 F. Supp. 2d 1, 6 (D.D.C. 2004) (stating that a court may convert a preliminary injunction into a grant of summary judgment where there is no new evidence and the court adapts the previous findings of fact or law to the summary judgment standard); Int’l Res. Recovery, Inc. v. United States, 64 Fed. Cl. 150, 161 (2005) (“In short, because there has been no supplemental evidence which alters the court's prior conclusion and no change in the law since denial of the motion for preliminary injunction, the law of the case doctrine bars this claim.”).

IV. ARGUMENT

A. The Corps Fully Complied with NEPA.

The Amended Complaint asserts that the Corps acted arbitrarily and capriciously in permitting the filling of 8.87 acres of wetlands without including an expanded discussion of the noise impacts of FLL in an SEIS. Pls.' Mem. at 12. However, as this Court held, the Corps' obligations under NEPA are commensurate with the action it is taking—permitting the fill of waters of the United States—and the portion of the project that is under its control. Order Denying Prelim. Inj. (“Order”) at 10 (ECF No. 30). Therefore the Corps' NEPA obligations as a coordinating agency are limited. Indeed, Congress has required the Corps to defer to the FAA on analysis of aviation issues such as airline noise. Even if these noise impacts were within the proper scope of the Corps' NEPA analysis, however, the Corps nonetheless acted reasonably in adopting the FAA's EIS and declining to prepare an SEIS, because the 2008 EIS extensively discusses noise impacts using an established methodology and the Corps reasonably relied upon it; information regarding health impacts was not “new”; and a mitigation plan is in place to address the impacts of noise.

1. The Corps, a Coordinating Agency, Reasonably Limited its Analysis to Effects of the Permitted Activity and Deferred to the FAA, the lead agency, on Noise Impacts.

The Corps properly conducted its NEPA review of the impacts of the activity for which the permit was sought: the fill of 8.87 acres of jurisdictional wetlands. AR 21745-89. Plaintiffs argue that NEPA requires supplemental analysis, by the Corps, of the potential impacts on human health from the increased noise resulting from the operation of FLL. However, as set forth below, the Corps, as a coordinating agency with a relatively minor role in the overall project, properly defined the scope of its NEPA obligations, duly relied upon the FAA's aviation expertise, and fully analyzed the environmental effects of their actions.

a) FAA, Not the Corps, Was the Lead Agency.

The Vision 100 Act provides that the FAA “shall be the lead agency for . . . airport capacity enhancement projects. . . and shall be responsible for defining the scope and content of the [EIS].” 49 U.S.C. § 47171(h); Order at 9. Pursuant to this Act, the FAA served as lead agency on the challenged EIS, and the Corps (along with other state and federal agencies) coordinated with FAA,

focusing on their respective areas of expertise. Plaintiffs continue to argue that the Corps somehow was not a coordinating agency, and presumably was therefore the lead agency. Pls.' Mem. at 19. However, the Memorandum of Understanding ("MOU") between the Corps and the FAA makes clear that the FAA will be the lead agency and the Corps is responsible for the more limited permitting and environmental review decisions that are within its jurisdiction, that is, waters of the United States. See AR00014.¹

Where multiple agencies are involved in the creation of an EIS, a coordinating agency can adopt the EIS of the lead agency if it is satisfied that its comments and suggestions are addressed. 40 C.F.R. §§ 1501.5, 1501.6, 1506.3(c); Sierra Club, 295 F.3d at 1215 ("Agencies are not required to duplicate the work done by another federal agency which also has jurisdiction over a project."). Thus, rather than "duplicating" the work done by the FAA and conducting their own analysis of noise (or other areas within the FAA's expertise), the Corps discharged their NEPA obligations by analyzing the effects of the permitted activity within the Corps control—the filling of several acres of wetlands—and adopting the FAA's EIS for other impacts. Both decisions—to limit the scope of the Corps environmental review, and to defer to FAA the issue of noise—were reasonable, and due deference.

b) The Corps reasonably Limited the Scope of Its environmental Review to the Direct, Indirect, and Cumulative Impacts on the Affected Wetlands.

Plaintiffs argue that the Corps' decision to focus its environmental review on the impacts within its jurisdiction and control was improper, because a CWA permit is necessary for the entire project to proceed. Pls.' Mem. at 12-13. This misunderstands the applicable regulations and case law. The Corps' decision to focus its environmental review on the effects of the permitted activity was entirely reasonable, and is due deference.

Any environmental review must have a defined scope or the range of potential direct, indirect, and cumulative effects would be limitless. To address this, the Corps promulgated

¹ The Corps acknowledges that in several email conversations contained in the Record, Corps and FAA employees did not consistently refer to the Corps role as that of a "coordinating agency." See Pls.' Mem. at 19-20. However, nowhere did Corps personnel represent that the Corps was the lead agency—nor could they, under the Vision 100 Act. See 49 U.S.C. § 47171(h) (FAA is lead agency in airport expansion projects).

regulations that provide guidance on the scope of its NEPA obligations. 33 C.F.R. pt. 325, App. B. Plaintiffs do not dispute that these regulations specify environmental review in the permitting context should be limited to “the specific activity requiring a DA [Department of the Army] permit.” *Id.* ¶ 7(b)(1). Of course, the DA permit at issue here is not for the entire expansion project—which is under the purview of the FAA, as lead agency—but rather for the fill of several acres of wetlands. *See* AR 21745. *See also* 53 Fed. Reg. 3120, 3121 (Feb. 3, 1988) (preamble to regulations notes that “[w]hen the Federal action is the issuance of a 404 permit, then the activity which would be authorized by the permit is the subject of the NEPA document”); *id.* (noting that “NEPA does not expand the authority of the Corps to either approve or disapprove activities outside waters of the United States”).

Though the regulations provide parameters, the ultimate scoping decision is “entrusted . . . to the district commander to be based on a reasonable evaluation of the case-specific factual situation.” 53 Fed. Reg. at 3122. And courts routinely uphold the Corps’ discretion in this context. Order at 10; *Wetlands Action Network v. U.S. Army Corps of Eng’rs*, 222 F.3d 1105, 1117-18 (9th Cir. 2000); *Sierra Club v. United States Army Corps of Eng’rs*, 450 F. Supp. 2d 503, 518 (D.N.J. 2006).

Here, the district commander reasonably evaluated the factors identified in the regulations, AR 21671, and reasoned that Corps’ jurisdiction “is limited to the work in jurisdictional waters. The project is for the expansion of a runway, which is under the purview of the FAA [and] . . . does not serve to expand the Corps jurisdiction to the uplands.” *Id.* The Corps further reasoned that it only “exert[s] control over impacts to jurisdictional wetlands.” *Id.* Therefore the Corps concluded the scope of the Corps’ NEPA analysis is properly limited to the area “within the footprint of the regulated activity within the delineated water.” *Id.* The Corps’ decision to limit its NEPA review to the jurisdictional waters impacted by the permitted activity was reasonable and is entitled to deference. *See Wetlands Action Network*, 222 F.3d at 1117-18.

Plaintiffs attempt to second-guess this decision, arguing that the Corps permit was required for the project to go forward and therefore “[t]he Corps’ refusal to consider impacts other than those directly associated with filling wetlands violated NEPA.” Pls.’ Mem. at 13. However, whether or not

the Corps permit is necessary, in the but-for sense, for a project to go forward is not the dispositive factor that Plaintiffs claim.²

The Corps does not dispute that there may be some projects where the Corps has “sufficient control and responsibility” to warrant expanding the scope of its NEPA analysis beyond the permitted activity; indeed the regulations specifically contemplate such a situation. 33 C.F.R. pt 325, App. B ¶ 7(b); 53 Fed. Reg. at 3121. But as the district commander determined here, this is not such a project, because the vast majority of the project was under the purview of the FAA (which had already analyzed impacts from the totality of the project), and the Corps’ role was limited to filing several acres of jurisdictional wetlands—not permitting an entire runway. AR 21745. The district commander made this scoping determination using the factors established in Corps regulation, see AR 21671, and his decision was appropriate, deserves deference and is in no way arbitrary or capricious.

Within this appropriate scope, the Corps’ analysis of the direct, indirect, and cumulative impacts of the permitted activity—that is, filling wetlands—was beyond sufficient. Plaintiffs’ arguments to the contrary are not at all persuasive. Order at 13-14. The Corps, in conjunction with FAA and other agencies exhaustively analyzed, documented, and publicized the direct and indirect impacts to, inter alia, wetlands, water quality, costal resources, fish, wildlife and plants, etc. See AR 05505-6016 (FEIS Chapter 6, “Environmental Consequences”). And the Corps also extensively documented the cumulative impacts of filling the wetlands, with an exhaustive discussion of past and proposed projects, AR 06017-56, and potential cumulative effects on, inter

² Many cases have upheld the Corps’ discretion to limit the scope of its environmental review to the activity being permitted, even in cases where the Corps’ permit was necessary for an entire project to go forward. See Sierra Club, 450 F. Supp. 2d at 518; Mo. Coal. for the Env’t v. U.S. Corps of Eng’rs, 866 F.2d 1025, 1033 (8th Cir. 1989) (“The activity permitted by the Corps is not the construction of an industrial park or a stadium; it is the filling of wetlands....”); Save the Bay Inc. v. U.S. Corps of Eng’rs, 610 F.2d 322 (5th Cir. 1980); Sylvester v. U.S. Army Corps of Eng’rs, 884 F.2d 394 (9th Cir. 1989) (Corps’ EA prepared in conjunction with Section 404 permit to fill wetlands for construction of golf course appropriately declined to consider remainder of resort complex that same developer was building on neighboring uplands); Enos v. Marsh, 769 F.2d 1363, 1371-72 (9th Cir. 1985) (Corps’ EIS for construction of harbor project need not consider effects of planned shoreside facilities not funded by or otherwise under the control or supervision of the Corps); Winnebago Tribe of Neb. v. Ray, 621 F.2d 269 (8th Cir. 1980) (Corps’ EA properly considered the environmental effects of only the 1.25 miles (out of 67 total miles) of transmission line for which applicant sought river-crossing permit), cert. denied, 449 U.S. 836 (1980).

alia, wetlands, water quality, fish, wildlife, and plants and Essential Fish Habitat. See AR 06037-56 (FEIS Chapter 7.3 “Cumulative Impact Comparison”).

Plaintiffs argue that “among the secondary and cumulative impacts from the filling of the wetlands is [sic] . . . cardiovascular disease and cognitive impairment of children – stemming from increased noise. . . .” Pls.’ Mem. at 14. But increased risk of cardiovascular disease is not a direct, indirect, or cumulative impact of permitting the fill of several acres of wetlands. Potential impacts on the human environment due to noise stem (if at all) from the overall project, and therefore would be properly analyzed, if at all, by the lead agency that permitted the project: the FAA. The Corps permitted a much smaller activity. Though the fill of wetlands may be causally linked to the potential impact in a but-for sense, it is otherwise unrelated to it. See, e.g., Dep’t of Transp. v. Pub. Citizen, 541 U.S. 752, 767 (2004) (rejecting “unyielding” but-for causation in NEPA scoping analysis). Moreover, to the extent noise impacts are deemed to result from the Corps permitting decision, as discussed below, they are adequately discussed in the FAA’s EIS which was incorporated by reference by the Corps. Therefore, it is clear that the Corps adequately discussed the environmental impacts of its decision to permit the filling of 8.87 acres of wetland and has not violated NEPA.

c) The Corps Reasonably Deferred to FAA on Issues of Noise.

To the extent the Corps was required to consider noise impacts in its environmental analysis, it did so by reasonably relying upon the FAA’s extensive analysis. The Corps’ reliance on FAA’s use of its existing methodology was reasonable and is due considerable deference. Rather than being arbitrary in deferring to the FAA on a matter within that agency’s core jurisdiction and area of expertise, the Corps followed Congress’ express direction, and therefore acted reasonably.

Plaintiffs acknowledge that NEPA regulations allow the Corps to “incorporate by reference another federal agency’s environmental review of a particular project into its own evaluation of that same project.” 40 C.F.R. § 1502.21; Pls.’ Mem. at 15. And Plaintiffs acknowledge that through incorporating the FAA’s analysis, the Corps did include noise impacts in its environmental review. Pls.’ Mem. at 15. Plaintiffs, however, disagree with the FAA’s methodology for describing and analyzing noise impacts, and seek to have the Court find the Corps’ reliance upon the work of its

more experienced counterpart agency arbitrary and capricious. See id. (lack of discussion of potential health impacts of noise renders noise discussion arbitrary). However the FAA's methodology for analyzing the effects of noise on the human environment is not at all arbitrary, nor is the Corps arbitrary for relying on it.³

As an initial matter, the FAA's reliance upon its own experts was clearly reasonable: "an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." Or. Natural Res. Council, 490 U.S. at 378; Citizens for Smart Growth, 716 F. Supp. 2d at 1225. Specifically, courts "defer to [FAA's] reasonable exercise of its judgment and technical expertise" in the area of aircraft noise. Grand Canyon Air Tour Coal. v. FAA, 154 F.3d 455, 460 (D.C. Cir. 1998); U.S. Air Tour Ass'n v. F.A.A., 298 F.3d 997, 1008 (D.C. Cir. 2002).

FAA's established methodology for analyzing the effects of airline noise on the human environment has been accepted and concurred with by the U.S. EPA, the U.S. Air Force, and the FAA. See AR 05280-504 (FEIS Chapter 5.C, describing methodology). Further, many federal courts have upheld the FAA's use of this methodology to determine noise impacts. See, e.g., Seattle Cmty. Council Fed'n v. FAA, 961 F.2d 829, 833-34 (9th Cir. 1992); City of Grapevine, Texas v. DOT, 17 F.3d 1502, 1507-08 (D.C. Cir. 1994); Cmtys., Inc. v. Busey, 956 F.2d 619, 623-25 (6th Cir. 1992). Valley Citizens for a Safe Env't v. Aldridge, 886 F.2d 458, 467-69 (1st Cir. 1989); Sierra Club v. U.S. Dep't. of Transp., 753 F.2d 120, 129 (D.C. Cir. 1985). The methodology used to measure, describe, and analyze the level and effects of noise in an EIS is a decision properly within the expertise of the FAA and Plaintiffs could pursue any legitimate claim relating to that methodology before that agency. See Valley Citizens, 886 F.2d at 467-69 (reliance on National

³ It is notable that the Plaintiffs have not directly challenged the FAA's methodology in the FEIS or its underlying analysis with regard to noise. They had the opportunity to do so when they sued the FAA in connection with this project. See City of Dania Beach, 628 F.3d at 591. But Plaintiffs did not; and, as the FAA's FEIS was not even challenged on this ground—let alone demonstrated to be deficient—it is not arbitrary for the Corps to rely on it. See, e.g., Nat'l Mitigation Banking Ass'n v. U.S. Army Corps of Eng'rs, No. 06-cv-2820, 2007 WL 495245, at *25 (N.D. Ill. Feb. 14, 2007) (Where FAA's FEIS is not arbitrary and capricious, "[b]y extension, it was not arbitrary or capricious for the Corps to rely on the conclusions in the FEIS. . .").

Academy of Science Guidelines to determine the minimum aircraft noise annoyance is acceptable; “the place to attack standard methodology ... is before the agency, not before a reviewing court”).

FAA’s approach combines negative impacts of noise (ranging from annoyances such as interference with speech to serious health effects such as hearing loss and loss of sleep) into a composite value. See generally AR 05305-35 (FEIS Chapter 5.C.1.1.3 “Noise Impacts On Humans”). FAA then seeks to define land uses that are compatible and incompatible with levels of noise as described using the composite. See AR 05305 (FEIS 5.C “Noise and Compatible Land Uses”); AR 01235–512 (FEIS Appendix H “Noise”). While the Plaintiffs would prefer an approach that includes a discussion of potential health effects of noise, FAA’s approach, which discussed such effects in the aggregate through a land use lens, does not render its methodology arbitrary, nor, in turn, does it render the Corps’ reliance on this methodology arbitrary.⁴

When Plaintiffs brought their concerns regarding noise impacts, including the WHO report, to the Corps’ attention, the Corps directed it to the FAA, which responded that (1) noise impacts were adequately analyzed using FAA’s accepted methodology, and (2) extensive ongoing noise abatement programs that are a condition of the project approval addressed this concern. AR 21331-33; see also AR 06300–13 (FAA ROD Chapter 4.1 “Noise and Compatible Land Use” describing FAA’s required noise mitigation measures). Having considered Plaintiffs’ comments regarding noise, and the response of the agency with the institutional expertise, the Corps then issued the Permit which is the subject of this lawsuit. Plaintiffs suggest that its reliance on the FAA was misplaced because “FAA never used its ‘expertise’ to analyze the cumulative or secondary impacts of noise on the health of residents.” ECF No. 53 at 18. But the mere fact that FAA opted to analyze noise using its accepted methodology rather than that proposed by Plaintiffs does not mean its analysis is not due deference, or that the Corps was arbitrary in relying on FAA’s methodology.

Indeed, far from being unlawful for the Corps to rely on the FAA’s noise analysis, the Corps is required by law to defer to the FAA on this issue. 49 U.S.C § 47171(h) (coordinating agencies shall give substantial deference to aviation expertise of FAA). FAA certainly has greater expertise

⁴ Indeed, though Plaintiffs criticize the FAA’s approach for referring to the composite of noise effects in terms of “annoyance” even the Plaintiffs’ WHO report includes an EU Directive recommending evaluating environmental noise exposure on the basis of estimated noise annoyance. AR 17684-90.

on the effects of airport noise than does the Corps.⁵ Legislative history of the Vision 100 Act shows that Congress intended that due to its expertise “in conducting environmental reviews. . . . the [FAA] should play a lead role in determining which analytical methods are reasonable for use in determining the transportation impacts. . . particularly in the area of noise impacts.” H.R. Rep. No. 108-334, at 128 (2003) (Conf. Rep.), reprinted in 2004 U.S.C.C.A.N. 2212, 2229.

Further, cases that analyze the interaction between coordinating agencies—even absent this required deference—point to the same common sense conclusion: the Corps was reasonable in limiting the scope of its NEPA obligations to the effects on wetlands, while leaving aviation impacts, such as those relating to airline noise—to the FAA. See North Carolina v. City of Va. Beach, 951 F.2d 596, 605 (4th Cir. 1991); Cal. Trout v. Schaefer, 58 F.3d 469, 473-74 (9th Cir. 1995); Order at 10-11 n.5.

Requiring a federal permitting agency like the Corps to evaluate additional alleged effects of airport noise over which it possesses no authority or discretion to act—noise which was extensively discussed in the FEIS by the agency with jurisdiction and control over noise issues at FLL—is not required under the law, nor is it reasonable. The Corps did not act arbitrarily in determining the scope of its NEPA requirement to be commensurate with the activity for which its approval was sought, nor in adopting the FAA’s noise analysis and methodology.

2. Extensive Noise Mitigation Obviates the Need for Further Environmental Review of Noise Impacts.

Even if the impacts of noise raised by Plaintiffs were within the scope of the Corps’ NEPA obligations and were inadequately analyzed—which they were not on both counts—these impacts are being mitigated to reduce their significance, obviating the need for further environmental review in the first instance, or an SEIS now.

⁵ Plaintiffs misstate the interaction between EPA and FAA on noise. Pls.’ Mem. at 18. EPA is not the sole arbiter of noise impacts. Rather, FAA analyzes noise in part pursuant to the Federal Interagency Committee on Noise Report. This Report was produced by representatives of the departments of Transportation (Office of the Secretary and the Federal Aviation Administration), Defense, Justice, Veterans Affairs, Housing and Urban Development, the Environmental Protection Agency and the Council on Environmental Quality. AR 05609; AR 01235. This Committee was chartered specifically to assess airport noise impacts. That EPA can by law request a review and report from FAA on health effects of noise is not germane to this dispute. The EPA had no objections to the EIS at issue here that were not addressed by the FAA.

“When mitigation measures compensate for otherwise adverse environmental impacts, the threshold level of ‘significant impacts’ is not reached so no EIS is required.” C.A.R.E. Now, Inc. v. F.A.A., 844 F.2d 1569, 1575 (11th Cir. 1988) (citing Cabinet Mountains Wilderness/Scotchman’s Peak Grizzly Bears v. Peterson, 685 F.2d 678, 682 (D.C. Cir. 1982) (where airport noise mitigation measures would reduce overall noise level for the majority of residents, FAA finding that the mitigation measures to reduce the environmental impact was reasonable)); see also Sierra Club, 295 F.3d at 1221; Sierra Club, 753 F.2d at 129 (FAA did not need to prepare a new EIS where noise mitigation measures were in place to reduce this environmental impact).

Here the ROD includes many mitigation measures to account for the effects of noise. See AR 06300–12 (FAA ROD Chapter 4.1 “Noise and Compatible Land Use”). The noise mitigation measures listed in the ROD include voluntary sound insulation of eligible single-family and multi-family units with the FAA’s recommendation that an aviation easement be secured; voluntary acquisition of mobile home parks and mobile home units and relocation of residents in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act (49 C.F.R. Part 24); and voluntary sales assistance/purchase assurance (with sound insulation) for eligible single-family and multi-family units. The project was approved upon the condition that the mitigation measures are completed and implemented. See AR 06334 (FAA ROD Section 8 “Conditions and Approvals”). And FAA is committed to providing federal grant to support mitigation, and monitoring implementation of these measures. AR 06300–13. Therefore, the FAA and Corps are mitigating the effects of noise and there is no reason to prepare a SEIS on these effects.

3. No SEIS Is Required Because the WHO Report Does Not Represent “Significant New Circumstances or Information.”

Plaintiffs argue that the WHO report “presented a significantly new picture” of impacts of noise, sufficient to require an SEIS by the Corps. Pls.’ Mem. at 20. However this is not the applicable legal standard. The 2011 study did not trigger the need for a SEIS because it provided neither significant new circumstances nor significant new information. Plaintiffs’ concerns were already raised as early as 2008. There was therefore no need for the Corps to prepare a SEIS.

Plaintiffs acknowledge that an SEIS is only required where “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” Pls.’ Mem. at 20 (citing 40 C.F.R. § 1502.9(c)(1)(ii)). They also concede that the information contained in the WHO Report is not “new” as Plaintiffs themselves provided many of the “individual studies” that make up the WHO report to the FAA. *Id.* at 21 (“Plaintiffs previously submitted other individual studies to the FAA on the issue” and “the WHO Report synthesized” these studies with other information); see also AR 17464 (“These concerns are not newly discovered. We raised these concerns as early as January 2008 when we submitted a letter to the Federal Aviation Administration....”).

Plaintiffs’ argument is that because FAA did not adequately “consider[] and discuss” their concerns, a SEIS is required. Pls.’ Mem. at 21. This is simply another version of Plaintiffs’ unfounded attack on the FAA’s use of its existing methodology to describe the impact of noise on the human environment. As the record demonstrates, Plaintiffs’ concerns were considered by the agency—along with hundreds of other comments—and were explicitly addressed in an appendix to the FEIS. AR 04802; AR 04874; AR 04998 (FEIS App. R “Response to Comments Received After the Close of the Draft EIS Comment Period”); e.g., Save the Peaks Coal. v. U.S. Forest Serv., 669 F.3d 1025, 1037 n.5 (9th Cir. 2012) (to determine whether agency has addressed issue, “courts may consider responses to comments”). The argument that if FAA’s consideration of and response to comments were not satisfactory to the Plaintiffs then this renders the information somehow “new” so as to require an SEIS is must also be rejected as a matter of law. See Or. Natural Res. Council, 490 U.S. at 374 (decision whether to prepare an SEIS is based on whether “the new information is sufficient to show that the remaining action will ‘affect[] the quality of the human environment’ in a significant manner or to a significant extent not already considered.”) (emphasis added, citations omitted). Here, noise impacts were “already considered” and even if this consideration did not produce the policy result Plaintiffs would have preferred, it obviates the need for the agency to address them anew.

Therefore, as Plaintiffs had provided information regarding the impacts of noise to the FAA and 2008, and the FEIS incorporated a consideration of Plaintiffs comments on this issue, a 2011

synthesis of such studies does not represent significant new information sufficient to warrant a SEIS. See, e.g., City of Olmsted Falls, Ohio v. F.A.A., 292 F.3d 261, 274 (D.C. Cir. 2002) (no SEIS needed where “much of what [Plaintiff] dubs ‘new’ is not. It was all known to the FAA prior to the issuance of the Record of Decision.”).

B. The Corps Fully Complied With the Clean Water Act.

This Court may set aside the Corps’ permit decision only if Plaintiffs demonstrate that the decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A); Van Antwerp, 526 F.3d at 1360 (this standard is “exceedingly deferential” to the Corps); see supra § II.D (Review Under the APA).

As discussed extensively above regarding NEPA and equally applicable to the CWA Section 404 analysis, the Corps, as a coordinating agency under the Vision 100 Act, was required by statute to provide “substantial deference” to the FAA’s expertise. See 49 U.S.C. § 47171(h). The Corps’ project scope analysis was limited to “impacts to jurisdictional wetlands within the runway footprint and equipment access/maintenance corridors, secondary impacts, and impacts to wetlands with the Runway Protection Zone (RPZ).” AR 21671. For the runway extension project, the Corps’ primary role was to ensure any impacts to jurisdictional wetlands were avoided and minimized to the extent practicable, and that remaining impacts to jurisdictional wetlands were mitigated. 33 C.F.R. §§ 320.4(r); 332.1.

1. The Corps’ Public Interest Analysis Was Not Arbitrary or Capricious, and Properly Considered and Weighed All Relevant Factors.

Plaintiffs argue that the Corps’ public interest review was arbitrary because it allegedly did not take into consideration the project’s effect on public health and allegedly weighed operational benefits, such as increased transportation efficiencies and safety, from extending the south runway easterly into the jurisdictional wetlands against only “the detriments of filling the wetlands under the runway’s eastern end.” Pls.’ Mem. at 22-23. Plaintiffs’ argument does not provide a complete

picture of the scope of the Corps' public interest analysis, and ignores the numerous factors the Corps determined to be relevant for purposes of its public interest analysis, which included much more than just operational benefits or wetland effects. Plaintiffs' argument also continues to ignore the scope of the Corps' role as a coordinating agency and the comprehensive cumulative and secondary impact analysis performed by the FAA, as lead agency on the project, and incorporated by the Corps into its decision document. AR 21664; see supra § IV.A.1

First, the numerous public interest factors considered by the Corps are listed in the environmental assessment, and included many more factors than just harm to the wetlands or operational benefits from the expanded runway. AR 21714. Other factors weighed by the Corps in its analysis included conservation, economics, aesthetics, general environmental concerns, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, water quality, safety, and the need and welfare of the people. Id. For each of these factors, the Corps provided a discussion of the information it deemed relevant for purposes of its public interest analysis. AR 21714-18. Moreover, "[b]oth cumulative and secondary impacts on the public interest were considered." Id.

Second, Plaintiffs' argument that the Corps' public interest review was arbitrary ignores the scope of the Corps' jurisdiction at the project and its role as a coordinating agency under the Vision 100 Act. While the overall scope of the Corps' environmental review was limited to project impacts on jurisdictional wetlands, the public interest review included all factors determined by the Corps to be relevant to its analysis. AR06331-32; AR 21671; AR 21714. The Corps did defer to the FAA, as lead agency, to analyze potential harm to human health, which the FAA did in the FEIS (AR 00048-6221), ROD (AR 06232-823), and Written Re-Evaluation of the FEIS (AR 21335-466). However, the FAA's public health analysis informed the Corps in its own decision on the Permit, and was

incorporated into the Corps' decision document. AR 21664. Specifically, Chapter 7 of the FEIS, entitled "Cumulative Impact," was referenced in the Corps' cumulative and secondary impacts analysis (AR 21721), and included a discussion of airport noise impacts and the mitigation of those impacts. AR06038-39. As this Court previously recognized, the Corps, as a coordinating agency, determined properly that its "jurisdiction was limited to work in jurisdictional waters because the project was under the purview of the FAA." Order at 10 (internal quotations omitted). The Court also recognized that "[t]he Corps' decision to limit its review to the waters impacted by the project should be accorded deference." *Id.* (citing Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 401 F. Supp. 2d 1298, 1312 (S.D. Fla. 2005); Or. Natural Res. Council, 490 U.S. at 375-76).

Against this background, it would have been entirely appropriate for the Corps in its public interest review analysis to weigh only the public benefits from the expanded airport against the detrimental effect of the project on the jurisdictional wetlands. See 33 C.F.R. § 320.4(a)(1).⁶ This is particularly appropriate where excluded from the MFR/EA were "noise impacts" and "lifestyle impacts."⁷ AR 21701. Nevertheless, the Corps' public interest review addressed a multitude of relevant factors, and focused on beneficial effects, negligible effects, and neutral effects (AR 21714), and determined there would be no adverse effects due to the required mitigative actions, rendering any potential adverse effects neutral.⁸ *Id.* Thus, based on its independent environmental assessment, which incorporated the FAA's FEIS, ROD, and Written Re-Evaluation of the FEIS (AR 21664), and

⁶ The regulations require the Corps to conduct a public interest review that balances the "benefits which reasonably may be expected to accrue from the proposal . . . against its reasonably foreseeable detriments," with specific consideration for the "national concern for both protection and utilization of important resources." 33 C.F.R. § 320.4(a)(1). Thus, the Corps' own regulations place particular emphasis on the protection of "resources," which the Corps did in ensuring the mitigation of negative impacts.

⁷ Significantly, Plaintiffs do not cite to a single case or regulation requiring the Corps to make a specific finding such as the one suggested by Plaintiffs that "the economic benefits of the runway extension to the local economy outweigh those public health risks . . ." Pls.' Mem. at 23. Moreover, Plaintiffs request for such a finding ignores the Corps' weighing of all relevant factors, and consideration of cumulative impacts.

⁸ "General environmental concerns" is one of the factors determined by the Corps to be "[n]eutral as result of mitigative action." AR 21714.

consideration of the factors it determined to be relevant for purposes of the public interest analysis of the runway extension project into jurisdictional wetlands, the Corps concluded “that issuance of a Department of Army permit . . . is not . . . contrary to the public interest.” AR 21737.

The Corps’ public interest determination should be accorded deference, and should be upheld as “the Corps considered all relevant factors and . . . there is credible evidence in the record to support its action.” Env’tl Coal. of Broward Cnty., Inc. v. Myers, 831 F.2d 984, 986 (11th Cir. 1987). Moreover, “[a] court should not substitute its own views for the decision reached by the agency. These principles of judicial review are particularly appropriate where the agency decision under review includes a ‘balancing’ process like the ‘public interest’ review provided for by the Corps’ regulations.” Id. (citing 33 C.F.R. § 320.4(b)); see also Nw. Bypass Grp. v. U.S. Army Corps of Eng’rs, 470 F. Supp. 2d 30, 50 (D.N.H. 2007) (finding that although the Corps’ CWA public interest regulations “require the Corps to evaluate the impact to public interest factors, these statutory and regulatory provisions neither mandate what the Corps must put in the EA nor what the Corps’s decision should be. What is important for measuring the Corps’s decision against the arbitrary and capricious standard is whether the Corps performed an analysis and took into account the appropriate factors.”); Gouger v. U.S. Army Corps of Eng’rs, 779 F. Supp. 2d 588, 614 (S.D. Tex. 2011) (“[m]erely because Plaintiffs disagree with this analysis does not mean that it was arbitrary and capricious.”).

2. The Corps Fully Complied With All Applicable Public Notice Requirements

After the Court denied Plaintiffs’ motion for a preliminary injunction (ECF No. 30), Plaintiffs’ amended their complaint to include a new CWA challenge to the Permit, claiming for the first time that the Corps “the Corps did not provide a realistic opportunity for meaningful comments in violation of 33 C.F.R. § 325.3(a).” Am. Compl. ¶ 44. This new challenge is briefed fully in

Plaintiffs' pending motion for summary judgment where Plaintiffs claim that the Corps' public notices for the permit application were deficient and that the Corps allegedly hid "key" documents from public review and comment. Pls.' Mem. at 24.

Contrary to Plaintiffs' arguments, the Corps' public notices complied with the relevant CWA regulations, and provided the public with sufficient information to give a clear understanding of the proposed activity in the wetlands to generate meaningful comment. See 33 C.F.R. § 325.1(a). As explained by the Eleventh Circuit in affirming the adequacy of the Corps' public notice in another matter, "[t]he regulations . . . only require general descriptions of the proposed use." Env'tl Coal. of Broward Cnty., 831 F.2d at 986. Moreover, "[t]he requirements of the public notice are not couched in terms of inordinate specificity, but need only convey 'sufficient information to give a clear understanding of the nature and magnitude of the proposed activity to generate meaningful comment.'" Myers, 831 F.2d at 986 (quoting 33 C.F.R. § 325.3(a)). The regulations require only a "brief description of the proposed activity, its purpose and intended use, . . . including a description of the type of structures . . . to be erected on fills...." 33 C.F.R. § 325.3(a)(5).

In the present matter, the Corps complied fully with its regulations and the public notice requirements contained therein. Both the initial public notice dated March 1, 2011 and the second public notice dated May 31, 2011 detailed, among other things, the location of the project, the project purpose, the proposed work, the proposed avoidance and minimization of impacts to the wetlands, the applicant's compensatory mitigation plan, and a description of existing conditions. AR 13365-370; AR 19488-517. The public notices identified the FAA as the lead federal agency on the project (AR 13370; 19493), and informed the public that the project was "the same as the NEPA preferred alternative described in the FEIS," and provided the web address where the FEIS and supporting appendices were available for download by the public. AR 13372; 19494. The Corps further

apprised the public that it “anticipated that the FEIS w[ould] also serve as the basis for the Regulatory Division’s NEPA evaluation of the BCAD’s proposed work.” Id.

On March 29, 2011, in response to the initial public notice, Plaintiffs’ counsel submitted to the Corps a six page letter (AR 16834-39), and enclosed over three thousand pages of materials. (AR 13611-16833). Plaintiffs’ counsel argued in the letter, among other things, that their preferred runway alternative, C1, allegedly would reduce noise impacts. AR 16833. Although the public comment period was scheduled to close on March 31, the Corps extended the comment period for an additional two weeks, ending on April 14, 2011. AR 21671. During the extended public comment period on April 14, 2011, Plaintiffs’ counsel sent another letter to the Corps, enclosing the same noise related articles and studies previously provided to the FAA in January 2008, as well as the 2011 WHO report. AR 17464-845. When submitting its additional noise related comments to the Corps, Plaintiffs’ counsel stated “[t]hese concerns are not newly discovered. We raised these concerns as early as January 2008 when we submitted a letter to the Federal Aviation Administration, requesting that the FAA consider and analyze our concerns in its [FEIS].” AR 17464. Having submitted comments on two separate occasions to the Corps in response to the first public notice, as well as thousands of pages of materials, it is disingenuous for Plaintiffs to suggest that the Corps’ public notices were deficient or in any way deprived the public of an opportunity for meaningful comment.

The single case relied upon by the Plaintiffs to bring this new claim does not support it, and in fact demonstrates why Plaintiffs’ claim must fail. Plaintiffs rely solely on Ohio Valley Env’tl Coal. v. U.S. Army Corps of Eng’rs, 674 F. Supp. 2d 794 (S.D.W.Va. 2009) for the proposition that a public notice must provide substantive information on what Plaintiffs describe as a “key issue.” Pls.’ Mem. at 23-24. Plaintiffs’ argument begs the question of what is a “key issue” for purposes of a

permit review and public notice under the Corps' regulations. In the opinion relied upon by Plaintiffs, the "key issue" was the adequacy of the compensatory mitigation proposed by the applicant, because "compensatory mitigation is the principle factor considered when conducting a § 404 permit review." Ohio Valley, 674 F. Supp. 2d at 804. In fact, that district court determined: "Compensatory mitigation is the single most important 'material issue [] related to the justification of such a permit.'" Id. (quoting Appalachian Power Co. v. EPA, 579 F.2d 846, 852 (4th Cir. 1978)).

In Ohio Valley, the public notices were found inadequate because they failed to provide "any substantive information on mitigation," which "deprived Plaintiffs of an existing procedural right -- the right to comment intelligently" on that issue. 674 F.Supp.2d. at 804 (emphasis added). Here, unlike in Ohio Valley, the public notices described the applicant's compensatory mitigation plan, and noted that the required mitigation was "currently underway under Corps Permit SAJ-2002-00072." AR 13368; 19492 (which permit also was the subject of public scrutiny).

Plaintiffs here challenge only the public notices alleged "failure" to include a specific reference "to likely secondary and cumulative health impacts resulting from the proposed activity." Pls.' Mem. at 24. Such a specific reference was not required under the Corps' CWA regulations. See 33 C.F.R. § 325.3(a); Myers, 831 F.2d at 986. Moreover such a reference was particularly not necessary in this case, as the Corps properly limited its focus to the jurisdictional wetlands, and informed the public that it anticipated relying on the FAA's FEIS as the basis for its NEPA evaluation. AR 13372; 19494. As Plaintiffs knew or certainly should have known by the time of the Corps' public notices, the project's cumulative impacts were fully analyzed in the FAA's FEIS, including in Chapter 7 entitled "Cumulative Impacts."⁹ AR 06017-56 Plaintiffs cannot credibly argue now that neither they nor the public were aware of the multitude of impacts analyzed by the

⁹ "Airport Noise" was analyzed in Chapter Six, "Environmental Consequences," Section 6.C.1. AR05611-718.

FAA related to the project and contained in the FEIS and ROD—more than two years before the Corps issued its public notices.

Finally, given the extensive public involvement throughout the airport expansion project, Plaintiffs cannot legitimately argue that the Corps' public notices deprived the public of the opportunity to comment intelligently on the proposed project. The airport expansion project had been extensively coordinated with the public since the 1990s, and the scope of the public's involvement is well documented in the FEIS (AR 00300-671; 3799-4660; 4702-5031) and the ROD (AR 06330-31), as well as, summarized in the Corps' MFR/EA. (AR 21733-35). Both of the Corps' public notices provided the public with the internet address for the FAA's ROD (AR 13368; 19491) and FEIS (AR 13373; 19494). Moreover, the Corps explicitly stated its belief that the FEIS would "serve as the basis for the Regulatory Division's NEPA evaluation of the BCAD's proposed work." AR 13372; 19494.¹⁰ Further, both the ROD and FEIS provided the public with additional information on anticipated impacts to the environment, including anticipated noise impacts, from the expanded runway.¹¹

3. There is No Evidence Even to Suggest the Corps Hid Information from the Public.

In a single paragraph, Plaintiffs contend without support that "much of the information on which the Corps relied in making its permitting decision in the ROD . . . was never made available for comment." Pls.' Mem. at 24 (emphasis in original). This statement is followed by the equally unsupported claim that "[t]he Corps' main justification in the ROD for refusing to consider the public health impacts from increased noise is a document it received from the FAA, AR 21331-34 [the

¹⁰ The Corps' regulations specifically provide that "[a] district commander will normally adopt another Federal agency's EIS and consider it to be adequate unless the district commander finds substantial doubt as to technical or procedural adequacy or omission of factors important to the Corps decision." 33 C.F.R. § 230.21

¹¹ Plaintiffs admit that "[a]mong the topics addressed in the 2008 EIS were noise impacts and environmental health and safety risks to children." Pls.' Mem. at 3.

FAA's review and responses to Plaintiffs' comment letters to the Corps], in August 2011" Id. Plaintiffs do not cite any evidence that the FAA's three page review and response to comments received by Plaintiff Dania Beach's counsel was the "main justification" for the Corps' decision allegedly to "refus[e] to consider the public health impacts from increased noise" Id. As described in detail above, the Corps limited its environmental review to direct and indirect impacts to the jurisdictional wetlands, and the mitigation of those impacts. AR 21671. The Corps explained in the MFR/EA that "[t]he entire project is under the control of the FAA as the primary airport/runway authority. The Corps will exert control over impacts to jurisdictional wetlands." Id. The scope of the Corps' review was determined even before BCAD submitted its application for a CWA permit (see ROD, AR 06255; 6331-32) and, therefore, the three page document from the FAA certainly could not have been the "main justification" for the Corps' decision to address only impacts to the jurisdictional wetlands.

The three-page document from the FAA (AR 21331-33), which responded largely to the same concerns raised previously by Plaintiff Dania Beach during the FAA's public comment periods for the draft environmental impact statement, FEIS, and ROD, served at most only to identify where in the FAA's voluminous FEIS and ROD Plaintiff Dania Beach's comments to the Corps had already been addressed. AR 21678; AR 21700-701. Nothing in the record supports Plaintiffs' baseless claim that the FAA's three-page response served as the "main justification" for any decision of the Corps, or that the three page document was a "key" document hidden by the Corps from the public. Contrary to the Plaintiffs' allegations, the public was extensively involved in the entire airport expansion, and the Corps' complied with all applicable public notice requirements.

V. CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment should be denied, and summary judgment should be granted in Defendant's favor on all claims brought by Plaintiffs.

Respectfully submitted this 31st day of October, 2012,

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2012, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. A copy of the foregoing document was served by Electronic Case Filing, which will send a notice of electronic filing to all counsel of record in the above captioned action.

/s/ Reuben S. Schiffman
Reuben S. Schiffman