

Litigation Update 1LITIGATION UPDATE (MAY 13, 2003)

Sierra Club v Struhs (Leon County)

Sierra Club and other environmental groups filed a lawsuit challenging Chapter 261, Laws of Florida, specifically Section 9, alleging that the law violates the single subject requirement of Article III, section 6, the Florida Constitution. Chapter 261, passed as House Bill 813, is titled An Act relating to environmental protection and consists of nine substantive sections.

Sections 1-8, in part, authorize use of documentary stamp tax proceeds to pay for Everglades restoration bonds; authorize and govern issuance of Everglades restoration bonds; allocate Florida Forever funds to Everglades restoration; provide for supplementing the Save Our Everglades Trust Fund; modify the debt service provision of the Everglades restoration bonds; set forth a legislative finding that issuance of the restoration bonds is in the best interest of the State of Florida; and clarify the exemption from environmental permitting of certain Everglades restoration project components.

Section 9, which the plaintiffs challenge, modifies section 403.412, Florida Statutes, to specify that a citizen can only intervene in ongoing administrative proceedings and may not, merely by alleging citizenship, initiate or petition for proceedings under Chapter 120, Florida Statutes. This amendment states that it does not limit or prohibit a citizen whose substantial interests will be determined or affected from initiating proceedings under Chapter 120, and establishes the showing necessary to initiate formal proceedings.

A citizen's substantial interests will be considered to be determined or affected if the party demonstrates it may suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by this chapter. No demonstration of special injury different in kind from the general public at large is required. A sufficient demonstration of a substantial interest may be made by petitioner who establishes that the proposed activity, conduct, or product to be licensed or permitted affects the petitioner's use or enjoyment of air, water or natural resources protected by this chapter.

STATUS:

Motions for Summary Judgment - heard on February 17th .

The Judge ruled that Plaintiffs have failed to state a case or controversy

The Judge also ruled that it is clear that Chapter 261 does not violate the single-subject requirement of the Florida Constitution.

On March 4th, the Court entered a final order of dismissal

On March 27th, ECOSWF and Manasota-88 filed a notice of appeal to the 1st DCA. Their initial brief is due July 7th.

Bonding efforts for Everglades restoration under Chapter 261 have halted until resolution of the lawsuit. Also, it was reported during the Working Group meeting that another challenge has been filed.

Miccosukee Tribe v SFWMD

The Miccosukee Tribe sued the SFWMD alleging that the SFWMD was violating the Clean Water Act by discharging a pollutant from its S-9 pump station without obtaining a National Pollutant Discharge Elimination System (NPDES) permit.

STATUS:

Trial Court ruled that the SFWMD was required to obtain a NPDES permit. Appellate Court affirmed.

SFWMD filed a Petition for Certiorari requesting the United States Supreme Court to review the case.

United States Supreme Court has requested a "call for the views" of the United States regarding whether the SFWMD's Petition for Certiorari should be granted. The USDOJ has requested the views of federal agencies and will be submitting a brief establishing the "views of the United States".

SFWMD Condemnation Cases:

The SFWMD has several pending condemnation cases including those involving acquisition of land for the C-44 CERP Project, the Broward County Water Preserve Area and the Corkscrew Regional Ecosystem Watershed (CREW) Project.

United States v. South Florida Water Management District, et al., Case 88-CIV-Hoeveler (S.D. Fla.) A suit was brought in federal court in 1988 by the United States against Florida state agencies concerning phosphorus pollution from agricultural runoff in the Everglades.

STATUS:

- The case was settled in 1991
- A consent decree was entered in 1992
- The settling parties' joint motion to modify the decree, enlarging the scope of the cleanup but postponing completion from 2002 until 2006, was approved by the court on April 27, 2001
- On April 23, 2003, Judge Hoeveler, sua sponte, issued an order setting a hearing for May 2, 2003, to discuss the proposed state legislation to amend the Everglades Forever Act and its potential effects on the consent decree
 - o At the May 2nd hearing, Judge Hoeveler reconfirmed that the federal Court will continue to enforce the existing provisions of the Modified Consent Decree.
- A hearing is set for June 10, 2003 to provide the court with a status report on the restoration.

Garcia v. United States (8.5 Square Mile Area Case) (11th Cir.).

This lawsuit filed by a resident of the 8.5 SMA challenges the Army Corps' 2000 decision to purchase land interests in the 8.5 SMA adjacent to Everglades National Park, and to build a flood mitigation system there as part of the Modified Water Deliveries Project.

STATUS

- In July, 2002 the district court ruled in favor of the plaintiff and found that the Corps lacked statutory authority to purchase land in the 8.5 SMA as part of the MWD project.
- The United States appealed the decision.
- On February 20, 2003 the President signed the Consolidated Appropriations Resolution, 2003 which requires the Corps:

o to "immediately carry out alternative 6D (including paying 100 percent of the cost of acquiring land or an interest in land) for the purpose of providing a flood protection system for the 8.5 square mile area described in the report entitled "Central and South Florida Project, Modified Water Deliveries to Everglades National Park, Florida, 8.5 Square Mile Area, General Reevaluation Report and Final Supplemental Environmental Impact Statement" and dated July 2000, subject to certain conditions.

· On April 2, 2003, the Corps signed a Record of Decision implementing this legislation and adopting Alternative 6D.

· On April 20, 2003, the Eleventh Circuit granted the government's motion to vacate the judgment below and remanded with instructions to dismiss the case as moot in light of these developments, with each party bearing its own costs and fees.

Florida Panther

On April 23, 2003 the National Wildlife Federation and the Florida Panther Society provided to the USACE and the USDOJ a Notice to Sue over Violations of the Endangered Species Act (ESA), Administrative Procedure Act, National Environmental Policy Act, and Clean Water Act in Connection with Nationwide Permits (NWPs) 12, 14, and 40 as applied in Florida Panther Habitat. This Notice of Intent to Sue alleges that the USACE has violated the foregoing federal statutes by:

· improperly authorizing the use of four NWPs in habitat essential to the Florida panther's survival and recovery

· illegally issuing NWPs authorizing development in panther habitat without any consideration of panther impacts

· arbitrarily failing to consult with the US FWS pursuant to the ESA Section 7(a)(2)

· failing to carry out programs for the conservation of the panther in violation of ESA Section 7(a)(1)

· failing to place regional conditions, or case-specific conditions, under Section 404(e), relating to dredge and fill permits, to prevent the NWPs from having more than a minimal effect on the panther

· failing to prepare an Environmental Impact Statement for nationwide permits significantly affecting panther habitat.

The Notice lists steps necessary to cure and states the intent to initiate a lawsuit if the steps are not taken.

Also on April 23, 2003, the National Wildlife Federation, the Florida Wildlife Federation, and the Florida Panther Society provided the USACE and USDOJ with a Notice of Intent to Sue Over Violations of the Endangered Species Act, Administrative Procedures Act, National Environmental Policy Act, and Clean Water Act in Connection with the Fort Myers Mine #2. This Notice of Intent to Sue alleges that the USACE and the USFWS have violated the foregoing federal statutes by authorizing Florida Rock Industries' mining operation - known as Fort Myers Mine #2 - without adequately assessing impacts on the Florida panther. This Notice also lists steps necessary to cure and states the intent to initiate a lawsuit if the steps are not taken.

Everglades National Park Expansion

The National Park Service has received permission to acquire outstanding mineral interests within the Everglades National Park. The agency is presently assembling title and valuation evidence and expects to begin referring related cases to trial counsel toward the end of the calendar year.