

South Florida/Everglades Litigation Update 10/2004

Introductory note: The plain text has been provided by the United States Department of Justice. The text in bold has been provided by the South Florida Water Management District

DECISIONS

Florida Public Interest Research Group Citizen Lobby, Inc. v. EPA (11th Cir.)

Plaintiffs challenge the district court's holding that Florida's adoption of a methodology used to compile a list of impaired waters was not a change to Florida's water quality standards that would have required EPA review and approval. Florida did not formally propose the methodology as a change to its water quality standards.

On October 4, 2004, the U.S. Court of Appeals for the Eleventh Circuit reversed the decision below. The court rejected EPA's argument that, since EPA did not rely on the methodology adopted by Florida in reviewing the list of impaired waters, the methodology could not have been a water quality standard. The court held that the district court had an obligation to make a determination concerning whether the State's methodology resulted in waters not being included on the impaired water list even though the level of pollution in those waters had not changed. It did not find EPA's independent review of the list solved any problems that may be presented by the methodology. The court of appeals pointed out that the standards EPA would apply in reviewing the methodology if it were a change to the State's water quality standards is a different standard than it would apply in reviewing the impaired waters list. It also expressed concern that in the future, EPA might not undertake an independent review of the list without relying on the State's methodology. The court of appeals thus remanded the case to the district court for further proceedings to determine the effect of the State's methodology.

National Wildlife Federation v. Norton and Brownlee (D.D.C., No. 03-1393)

This case, filed June 30, 2003, challenges the U.S. Army Corps of Engineers' decision to issue a Clean Water Act Section 404 permit for the discharge of dredge and fill material into waters of the United States in connection with a limestone rock mine (Florida Rock Industries Fort Myers Mine # 2) in southwestern Florida. Plaintiffs also challenge the substance of a biological opinion rendered by the U.S. Fish and Wildlife Service concerning the project. Plaintiffs allege that the mining operations will destroy 5,217 acres of possible Florida panther habitat in violation of CWA, the Endangered Species Act, and the National Environmental Policy Act. Florida Rock Industries has joined the case as an intervenor-defendant.

On August 20, 2004, Judge Robertson issued an opinion granting Plaintiffs' motion for summary judgment on several claims. As to Plaintiffs' ESA Section 7(a)(2) claims, the Court ruled that the biological opinion failed to make a rational connection between the facts presented concerning habitat that would be lost due to the rock mine and the determination that the mine would not jeopardize the continued existence of the panther. The Court further noted that the biological opinion lacked analysis of the cumulative impacts of the mine. The Court also invalidated the Corps' Environmental Assessment and Section 404 permit, as these documents both relied on the Biological Opinion. The Court remanded the Biological Opinion and

Environmental Assessment for further consideration by FWS and the Corps.

Although the Court invalidated the 404 permit, the Court denied as moot Plaintiffs' motion for summary judgment with respect to the Corps' compliance with the Clean Water Act ("CWA"), in light of the Court's holding that the biological opinion was arbitrary and capricious.

While denying Plaintiffs' claims brought under the CWA as moot, the Court's opinion does contain discussion of Plaintiffs' CWA claims "to eliminate or narrow future disputes between the parties." As part of such discussion, the Court rejected Plaintiffs' CWA arguments, holding that: (1) the Corps completed an adequate alternatives analysis, (2) the Corps reasonably concluded that the permit would not contribute to significant degradation of the environment, and (3) the Corps adequately minimized impacts to wetlands. Judge Robertson also granted Federal Defendants' motion for summary judgment as to Plaintiffs' ESA Section 7(a)(1) claims, noting that the Corps had undertaken a Southwest Florida Environmental Impact Statement, which includes a review of the habitat used by the panther and draft review criteria that the Corps will use in assessing permit applications within panther habitat.

OTHER PENDING CASES

United States v. South Florida Water Management District (S.D. Fla., No. 88-1886) (consent decree)

Litigation continues in this 1988 case under a 1992 consent decree entered with the Florida Department of Environmental Protection and the South Florida Water Management District concerning phosphorus pollution from agricultural runoff in the Everglades. The Court held an evidentiary hearing on September 20-21 on the Tribe's motions for breach related to STA-3/4 and the Loxahatchee phosphorus exceedances. At the close of the hearing, the Court made "preliminary findings" that the Tribe has standing to seek relief on its motions, and that the Tribe established a "prima facie case of possible violations" of the Settlement. The Court continued the hearing until December 13 -15, 2004. At that time, the State Parties will have an opportunity to present evidence to rebut the Court's preliminary findings on the Tribe's standing. The Court will also hear other evidence at that time. The Court further ordered that the parties have until November 2 to file a report regarding the role of the Special Master, that the District and DEP shall file their exhibit and witness lists by November 29, and that the United States and Intervenors shall file their exhibit and witness lists by December 6. Over the coming weeks, the United States will be continuing in formal dispute resolution discussions with the co-settling State Parties, in an effort to resolve concerns about their proposal to re-present defenses to the Tribe's motions that are prejudicial to the United States.

On September 20-21, Judge Moreno conducted a preliminary hearing to address two motions filed by the Miccosukee Tribe alleging breach of the Settlement Agreement (one alleging the District did not build STA-3/4 on time, the other alleging violations of interim phosphorus levels in the Refuge in October 2001 and July 2002). With regard to the STA-3/4 motion, the District advised the Court that it would file a motion to amend the Settlement to reflect dates that actual flow-through operations occurred.

As a result, the court said it would defer any action on the Tribe's motion for breach. With regard to the Tribe's Loxahatchee motion, the court ruled that exceedances of interim levels in October 2001 and July 2002, which was undisputed, stated a claim for breach. As a result, the court ruled it would be necessary to have additional hearings to address (1) the scope of remedial response being implemented by the Settling Parties and, if necessary, (2) the cause of the exceedance. A hearing on remedy issues is set for December 13 in Miami.

South Florida Water Management District v. Miccosukee Tribe (U.S. Supreme Court/S.D. Fla., Nos. 98-06056/98-06057) (S-9 pumping station)

In this case, the Miccosukee Tribe brought a Clean Water Act (“CWA”) citizens’ action alleging that the South Florida Water Management District should be required to obtain a federal National Pollutant Discharge Elimination System (“NPDES”) permit to transfer phosphorus-bearing stormwater through the S-9 pumping station from the C-11 basin to Water Conservation Area 3A in western Broward County. Both the water management district court and the U.S. Court of Appeals for the Eleventh Circuit determined that a permit was required even though the district did not itself add anything to the water that was being pumped. On March 23, 2004, the U.S. Supreme Court vacated the decisions below and held that discharges of pollutant requiring a NPDES permit include point sources that do not themselves generate pollutants. The Court remanded the case for a ruling on whether the C-11 canal and WCA-3 are “meaningfully distinct water bodies,” such that an NPDES permit would be required in this case. Judge Lenard will preside over any further proceedings.

The Supreme Court denied FOE’s motion for attorney’s fees without prejudice to seek them before the 11th Circuit. On 10/15 Friends of the Everglades renewed its motion for fees with the 11th Circuit. SFWMD opposes the fees motion.

Miccosukee Tribe of Indians v. U.S. Army Corps of Engineers (S.D. Fla., No. 02-22778) (Interim Operational Plan)

This is a challenge by the Miccosukee Tribe to the Army Corps’ Interim Operational Plan (“IOP”) to avoid jeopardy to the endangered Cape Sable Seaside Sparrow in the Florida Everglades. The complaint, filed on September 20, 2002, alleges violations of the National Environmental Policy Act, the Endangered Species Act, the Administrative Procedure Act (“APA”), and the Federal Advisory Committee Act (“FACA”), the Due Process Clause, and the Indian Trust Doctrine. On August 4, 2004, Magistrate Judge O’Sullivan issued an order denying

the Tribe's motion to reopen discovery with respect to its FACA claim. The parties have agreed to a briefing schedule for cross-motions for summary judgment in early 2005.

Miccosukee Tribe v. Southern Everglades Restoration Alliance (S.D. Fla., No. 99-1315) (FACA)

In a complaint dated May 7, 1999, the Miccosukee Tribe alleges that various federal agencies and officials participated in the Southern Everglades Restoration Alliance ("SERA") in violation of the Federal Advisory Committee Act. The Tribe alleges that the defendants unlawfully relied on advice from SERA, which has caused continuing damage to tribal lands in the Everglades. On April 30, 2004, the federal defendants filed a motion for judgment on the pleadings asserting that FACA neither waives sovereign immunity nor provides a private right of action. The parties are awaiting a ruling on this motion.

Natural Resources Defense Council v. United States (S.D. Fla., No. 99-2899) (Cape Sable seaside sparrow)

On September 8, 2004, Judge Moore issued an Order affirming Magistrate Judge O'Sullivan's Report and Recommendation that Plaintiffs is entitled to an award of attorneys' fees and costs. In a complaint filed October 27, 1999, NRDC and other environmental groups alleged that the Corps was harming the endangered Cape Sable seaside sparrow through its operation of the Central and Southern Florida ("C&SF") Project, in violation of the Endangered Species Act. In particular, plaintiffs alleged that the Corps failed to implement the reasonable and prudent alternative set forth in a biological opinion issued by the U.S. Fish and Wildlife Service on February 19, 1999. The court never ruled on the merits of plaintiffs' claims, and plaintiffs voluntarily dismissed their complaint on November 7, 2002. Nevertheless, the court determined that Plaintiffs' lawsuit served as a catalyst that prompted the Corps to develop the Interim Operating Plan for protection of the endangered Cape Sable seaside sparrow.

Wildlife Conservation Fund v. Norton (M.D. Fla., No. 01-25) (Big Cypress ORV)

This is a challenge to an Off-Road Vehicle ("ORV") management plan for the Big Cypress National Preserve brought by ORV users. On August 1, 2003, the Magistrate Judge issued his report and recommendation finding that the Park Service's ORV management plan reasonably balances the agency's desire to permit ORV users access to the Preserve while minimizing the impacts of ORVs on natural resources, including several threatened and endangered species. The Magistrate Judge concluded that the administrative record amply demonstrates that the Park Service complied with NEPA by tiering its alternatives analysis off of a 1991 General Management Plan/EIS and by providing the public with an adequate opportunity to comment on both the draft and final ORV management plan. On September 16, 2003, the United States responded to Plaintiffs' objections to the Magistrate Judge's Report and Recommendation. The parties are awaiting a final decision.

Sierra Club v. Flowers (S.D. Fla., No. 03-23427) ("lakebelt" mining permits)

In a complaint filed originally in the U.S. District Court for the District of Columbia on August 20, 2002, Sierra Club and other environmental groups challenge the U.S. Army Corps of Engineers' decision to issue 12 permits for the discharge of dredge and fill materials into waters

of the United States under Section 404 of the Clean Water Act, 33 U.S.C. § 1344. The permits authorize ten mining companies to conduct limerock mining on 5,409 acres of wetlands in northwestern Miami-Dade County, Florida. Plaintiffs allege violations of the Endangered Species Act, National Environmental Policy Act, and CWA. The parties have filed cross-motions for summary judgment, and oral argument before Judge Hoeveler was held October 22, 2004. The parties are awaiting a decision.

National Wildlife Federation v. Brownlee (D.D.C., No. 03-1392) (Corps nationwide permits/Florida panther)

This case, filed June 30, 2003, challenges the Corps' decision to issue Nationwide Permits ("NWP's") 12, 14, 39, and 40, pursuant to Section 404 of the Clean Water Act. Plaintiffs request the court to enjoin the Corps from using NWP's 12, 14, 39, and 40 to authorize development in Florida panther habitat pending further Endangered Species Act consultations, CWA assessments, and additional analyses under the National Environmental Policy Act. Agripartners, LLP has joined the case as an intervenor-defendant, and the Florida Association of Community Developers and the Utility Water Act Group are appearing as *amicus curiae*. In a bench ruling on July 6, 2004, Judge Robertson denied the Federal Defendants' motion for partial summary judgment as to standing. The parties are now in the process of briefing their cross-motions for summary judgment on the merits of Plaintiffs' claims.

Florida Marine Contractors v. Williams (M.D. Fla., No. 03-229) (Florida manatee/dock permits)

In their second amended complaint filed May 12, 2004, several marine construction firms and an individual allege that the U.S. Fish and Wildlife Service has unlawfully applied the MMPA in withholding incidental take authorizations for a number of specific dock construction proposals subject to Corps permitting. The issue before the court is whether the Congress intended for the Service to enforce the MMPA within Florida's inland waterways. Judge Moody recently entered an order denying a motion to intervene filed by the Save the Manatee Club and several other environmental groups, which has been appealed. Meanwhile, the Service has filed a motion for judgment on the pleadings concerning the applicability of the MMPA. Plaintiffs have filed a cross-motion for summary judgment. The parties are awaiting a ruling on their motions.

City of Cape Coral v. United States Fish and Wildlife Service (M.D. Fla., No. 03-497) ((Florida manatee/dock permits)

This lawsuit, filed August 28, 2003, alleges that the U.S. Fish and Wildlife Service unreasonably delayed issuing biological opinions on hundreds of U.S. Army Corps of Engineers permits for the proposed discharge of dredge or fill materials into waters of the United States in connection with proposed dock construction projects within the City of Cape Coral. The City also challenges the merits of a final rule that regulates the operation of watercraft on the Caloosahatchee River and in San Carlos Bay.

On July 27, 2004, Judge Moody denied without prejudice the Federal Defendants' motion for partial summary judgment as to mootness. The Court noted that, although the Federal Defendants have completed the allegedly overdue biological opinions, the Federal Defendants

had not demonstrated that delays in ESA consultations are not likely to recur in the future. In a separate Order filed the same day, Judge Moody denied without prejudice the Federal Defendants' motion to dismiss as to standing. Judge Moody recently also entered an order denying a motion to intervene filed by the Save the Manatee Club and several other environmental groups, which has been appealed. The parties will complete summary judgment briefing in early 2005.

City of Layton v. INS (S.D. Fla., No. 02-10073) (Florida manatee)

In this case filed September 10, 2002, the municipal plaintiff challenges the Environmental Assessment ("EA") supporting the U.S. Immigration and Naturalization Service's decision to relocate its Border Patrol Interim Processing Center to a site in the Florida Keys. Plaintiff alleges that the EA did not properly consider the new Center's effect on the endangered Florida manatee, meaningful programmatic alternatives, and various socioeconomic consequences of moving multiple immigration detention cells to a small, primarily residential town. The owner of the property recently declined to lease the property to the federal government. As a result, the parties anticipate filing a joint motion to dismiss on grounds of mootness.

Florida Key Deer v. Brown (S.D. Fla., No. 90-10037) (key deer)

This is a long-running case challenging the Federal Emergency Management Agency's ("FEMA") administration of the National Flood Insurance Program in Monroe County ("NFIP"), Florida. In 1997, pursuant to a previous court order, FEMA completed Endangered Species Act consultation with the U.S. Fish and Wildlife Service concerning the NFIP. FEMA has implemented the reasonable and prudent alternatives recommended by the Service in the consultation. However, plaintiffs allege that FEMA is still failing to ensure that its activities will not jeopardize the endangered Florida Key deer and other threatened and endangered species. On December 3, 2003, Judge Moore heard oral argument on the parties' cross-motions for summary judgment on plaintiffs' second amended complaint. The parties are awaiting a decision on the merits of the case.

Sierra Club v. Leavitt (N.D. Fla., No. 04-00120) (Section 303(d) list)

In this complaint filed April 22, 2004, plaintiffs challenge the U.S. Environmental Protection Agency's approval of Florida's list of impaired waters that require specification of Total Maximum Daily Loads pursuant to Clean Water Act Section 303. Plaintiffs allege that EPA arbitrarily and capriciously (1) approved Florida's 2002 303(d) list; (2) approved the delisting of certain waters from the 1998 303(d) list; and (3) failed to add certain waters to the 1998 and 2002 303(d) lists. The Court recently granted Plaintiff's motion to strike the Defendant's answer and ordered the Defendant to file a motion to strike or amended answer by November 1, 2004. Meanwhile, Sierra Club is scheduled to file its motion for summary judgment in March, 2005.

Micosukee Tribe of Indians of Florida v. EPA (S.D. Fla., No. 04-21448) and **Friends of the Everglades v. EPA** (S.D. Fla. No. 04-22072) (2003 amendments to Everglades Forever Act)

In this complaint filed June 17, 2004, the Micosukee Tribe challenges the U.S.

Environmental Protection Agency's determination that the State of Florida's 2003 amendments to the Everglades Forever Act do not constitute a change to state water quality standards. The Tribe alleges violations of the Clean Water Act and the Administrative Procedure Act. EPA anticipates filing by October 27, 2004 a motion to dismiss two of the three counts in the complaint, *i.e.*, a claim alleging a failure to perform a mandatory duty and a claim based on "administrative res judicata." After resolution of that motion, the parties will address plaintiff's claim that it is entitled to discovery. In a Complaint filed August 16, 2004, Friends of the Everglades challenges the same EPA determination at issue in the Miccosukee lawsuit.

Everglades land acquisition litigation (S.D. Fla./M.D. Fla.) (various cases)

The number of eminent domain cases filed in U.S. District Court for the Southern District of Florida on behalf of the U.S. Department of the Interior (DOI) for expansion of Everglades National Park now totals two thousand seven hundred seven (2,707), according to a count conducted by the U.S. Attorney's Office. Case referral is largely complete for this project; only seven (7) new condemnations have been initiated for lands within Everglades National Park boundaries this calendar year. Land condemnations for Big Cypress National Preserve in the neighboring Middle District of Florida are also winding down, with one new condemnation filed this year.

Over half the 2,707 total Everglades cases have been satisfactorily resolved through trial or settlement, with verdicts almost uniformly consistent with the government's valuation testimony. Fifty-five (55) cases were grouped for trial in July 2004 and forty-two (42) in August 2004. The court-appointed land commission returned just compensation recommendations for both groups that were largely consistent with the government's valuation testimony. An additional thirty (30) cases were tried as a group on September 27, 2004; the land commission has not yet issued its recommendation on this group. Twelve (12) cases are set for a group trial in October 2004, one (1) in November 2004, sixty-eight (68) in December 2004, fifty-one (51) in January 2005, five (5) in February 2005, and fifty (50) in March 2005. The U.S. Attorney's Office has also moved to set two consolidated trials containing one hundred thirty-five (135) cases in April 2005. Two additional trial groups with a total of eighty-two (82) cases are expected in May 2005.

Many other eminent domain cases in the Everglades National Park expansion project have remained on hold at the landowners' requests pending action by the court on pre-trial motions filed in United States v. 480 Acres of Land in Miami-Dade County, Florida, and Gilbert Fornatora, et al., (S.D. Fla., No. 96-1249). This is the lead case in a consolidated group of seven. A December 2001 trial for this group was continued indefinitely to permit the court to rule on motions regarding the "scope of the project", *i.e.*, whether (as alleged by defendants) the expansion of Everglades National Park authorized in 1989 caused a compensable decrease in value of the subject properties and whether, in anticipation of the 1989 legislation, the National Park Service impelled Miami-Dade County to impose zoning restrictions in 1981. On July 30, 2004, a magistrate judge finally issued a 27-page report and recommendation in favor of the United States on these issues. Landowners' counsel filed objections in August, seeking review by the chief district judge. The United States has responded and now awaits the chief judge's ruling. Because similarly situated cases may be affected by the precedential effect of this ruling, defendants in approximately one hundred ten (110) cases elected to defer trial until after the

court enters a final decision on the Fornatora motions

Twelve (12) eminent domain cases have also been referred and filed this year in the Southern District of Florida on behalf of the U.S. Army Corps of Engineers for acquisitions in the 8.5 Square Mile area.

Sierra Club v. EPA (N.D. Fla.)

On October 5, 2004, Sierra Club filed a Complaint against EPA for allegedly failing to perform a mandatory duty to withdraw Florida's delegated authority to administer the NPDES permitting program.

Florida Wildlife Federation v. SFWMD (S.D. Fla. Case NO. 02-80309-Altanoga)

FWF, Friends of the Everglades and Fishermen Against Destruction of the Environment sued the SFWMD to enjoin the operation of its S-2, S-3 & S-4 pump stations which move water from the EAA into Lake Okeechobee without a Federal Clean Water Act National Pollutant Discharge Elimination System (NPDES) Permit. The Miccosukee Tribe intervened as Plaintiff's. The City of South Bay and U.S. Sugar intervened as Defendants. The case was stayed pending certiorari review by the Supreme Court of the Miccosukee v. SFWMD, S-9 Case. FWF has now filed a Motion to Reopen the Case, to Amend and to Reopen Discovery. FOE and the Tribe oppose reopening the case. The defendants oppose a blanket reopening discovery. A hearing on those pending motions is set for November 3, 2004.