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Nat'l Wildlife Fed'n v. Brownlee, No. 03-1392, 2005 U.S. Dist. LEXIS 5688 (D.D.C. April 6, 2005)

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the D.C. district court. In February 2003, Florida and Alabama moved to intervene in this action, and the D.C. district court granted the motion in October 2003. In February 2003, the states also moved to abate or transfer the action in the Northern District of Alabama, where, in January 2003, they had filed a motion in the Alabama action to enjoin and declare void the settlement agreement, claiming that it violated the 1990 stay of that action.

On October 15, 2003, the Alabama district court issued a preliminary injunction prohibiting the Corps and Georgia from filing or implementing settlement agreements or entering into any contracts affecting the Chattahoochee basin without approval of the court. On November 7, 2003, the D.C. district court denied the motion to dismiss, transfer, or abate this action. On November 24, 2003, the Alabama district court issued a stay on all activity in that action until the D.C. district court issued an order deciding the validity of the settlement agreement. On February 10, 2004, the D.C. district court rejected Florida's and Alabama's challenge and directed the settlement agreement was valid and may be executed provided that the Alabama district court vacate the preliminary injunction. Then, the D.C. district court issued an order dismissing the action as moot since it approved the settlement agreement. Florida and Alabama filed an appeal challenging the D.C. district court's approval of the agreement with the United States Court of Appeals for the District of Columbia Circuit.

The court dismissed the appeals for lack of jurisdiction. However, the court determined that the February 10 decision did not render all claims moot, since the D.C. district court approved the settlement agreement conditionally, if the Alabama district court vacated the preliminary injunction. Therefore, the court vacated the D.C. district court's dismissal order, dismissed the appeals of the orders for lack of jurisdiction, and remanded the case to the district court.

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Nat'l Wildlife Fed'n v. Brownlee, No. 03-1392, 2005 U.S. Dist. LEXIS 5688 (D.D.C. April 6, 2005) (holding the Army Corps of Engineers violated the Endangered Species Act by failing to consult with the U.S. Fish and Wildlife Service before issuing nationwide permits to dredge and fill wetlands as allowed by the Clean Water Act).

National Wildlife Federation ("NWF") filed suit against the Army Corps of Engineers ("Corps") in the United States District Court for the District of Columbia, challenging four nationwide permits ("NWP") that the Corps issued. NWF alleged that the Corps violated the Clean Water Act ("CWA"), National Environmental Policy Act ("NEPA"), Endangered Species Act ("ESA"), and Administrative Procedure Act ("APA") by failing to consult with the U.S. Fish and Wildlife

Service ("FWS") when it issued permits for projects that may affect the endangered Florida panther. Most of the Florida panther's habitat is on wetlands. Under the CWA, the Corps regulates the dredging and filling of wetlands by issuing individual site permits after notice and public hearing. The Corps may also issue general NWPs for activities that the Corps finds "are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." The Corps renews the permits every five years, and the projects proceed without interaction with the Corps. NWPs prohibit activities that are in the vicinity or may affect threatened or endangered species without notifying the District Engineer that the activities met the requirements of the ESA. Section 7(a)(2) of the ESA compels the Corps to consult with the FWS whenever its actions "may affect" endangered species. Furthermore, under NEPA, the Corps must produce either an environmental impact statement or a finding of no significant impact ("FONSI"). In this case, the Corps issued four NWPs with accompanying documentation alleging "minimal impact" under the CWA, compliance with the ESA, and FONSIs for each permit.

NWF requested summary judgment on the following claims alleging that the Corps: 1) violated the ESA by not consulting with the FWS prior to issuing the four NWPs; 2) violated the ESA by not developing or implementing a conservation program for the panther; 3) violated the CWA and APA by arbitrarily, capriciously, and without required documentation, finding that the NWPs would have minimal individual and cumulative impact on the environment; and 4) violated NEPA and APA by arbitrarily, capriciously, and without proper evaluations, finding that the NWPs would have no significant impact on the environment. The court dismissed the second allegation, having already adjudicated the matter in a previous case. With regard to the first allegation, the Corps argued that while some of the actions covered by the NWPs "may affect" the panther, they would consult with the FWS on a case-by-case basis for each of the permits. The court held that the Corps was not entitled to deference in interpreting the ESA. It further held that the purpose of Section 7 of the ESA was to allow FWS consultation at the earliest time possible in order to provide a cumulative analysis of the combined proposed permits. Further, the Corps' failure to consult with the FWS on the four challenged NWPs violated the ESA. Because the finding of "minimal impact" under the CWA and the FONSI under NEPA are intertwined with compliance with Section 7 of the ESA, the court denied summary judgment on the third and fourth claims.

The court held that the Corps was in violation of the ESA for not consulting with the FWS when it issued nationwide permits.

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