Water Law Review

Volume 9 | Issue 2 Article 42

1-1-2006

Flordia Wildlife Fed'n v. United States Army Corp of Eng'rs, 401 F.Supp.2d 1298 (S.D. Fla. 2005)

Charles Sweet

Flordia Wildlife Fed'n v. United States Army Corp of Eng'rs, 401 F.Supp.2d 1298 (S.D. Fla. 2005)

The Center for Native Ecosystems, Biodiversity Conservation Alliance, and Forest Guardians (collectively "CNE") brought a Petition for Review of Agency Action in United States District Court for the District of Colorado, claiming that the United States Forest Service's ("Forest Service") approval of livestock grazing permits violated Wyoming's water quality standards, the Clean Water Act ("CWA"), the Administrative Procedure Act ("APA"), and the Endangered Species Act ("ESA"). CNE sought both declaratory and injunctive relief against Rick Cables in his official capacity as Regional Forester, and the Forest Service.

Between May 1999 and June 2004, the Forest Service issued grazing permits for seven allotments in the Pole Mountain area of the Medicine Bow National Forest in Wyoming. Before the court, CNE claimed that the Forest Service was aware of adverse impacts from livestock grazing as early as 1996, when state investigations labeled creeks within Pole Mountain as "functioning," though "at risk." CNE cited recent water samplings in which fecal coliform levels in Pole Mountain creeks violated Wyoming's state standard for fecal coliform concentrations. CNE argued that by violating Wyoming's state standards, the Forest Service also violated section 313 of the CWA, which requires federal agencies to comply with all state and local requirements. In response, the Forest Service presented evidence that it took voluntary improvement measures in response to the fecal coliform contamination and other harmful effects of livestock grazing.

Citing CNE's failure to prove arbitrary and capricious action on the part of the Forest Service, the court denied CNE's Petition for Review. The court observed that, in its decision to approve cattle grazing, the Forest Service relied on factors such as social and economic considerations, which the Wyoming standards specifically authorize. Moreover, the court maintained that the Forest Service did not present an implausible rationale for its actions, in light of the fact that only two creeks within the Pole Mountain area were affected. Additionally, the court acknowledged that the Forest Service worked with local conservation districts to address specific pollution and complied with state water quality standards to the same extent as any nongovernmental entity, as required by section 313 of the CWA. Further, the court noted that Wyoming state provisions require more than a violation of water quality standards in order to be enforced. Lastly, the court held that the Forest Service's reliance on other indicators of riparian health, in its decision to measure at the allotment satisfied the Forest Service's burden, supply a reasoned analysis for any change in policy.

The court denied CNE's Petition for Review because CNE failed to prove arbitrary and capricious action by the Forest Service.

Kathleen Potter

Florida Wildlife Fed'n v. United States Army Corps of Eng'rs, 401 F.Supp.2d 1298 (S.D. Fla. 2005) (holding that the United States Army

Corps of Engineers should not have limited its review of the environmental impact of a research facility built in a wetlands area to only the first phase of the plan).

In 2003, the Scripps Research Institute ("Scripps"), Palm Beach County ("County"), and the Florida Office of Tourism, Trade, and Economic Development ("OTTED") began the process of building a large research science center on the east coast of Florida. These groups agreed to build the project on Mecca Farms, a wetlands area in Palm Beach County that was previously an active orange grove. When farmers prepared the Mecca Farms site for agriculture, they constructed ditches to drain the site. Because water permanently inundated these ditches and they connected to a tributary of the Loxahatchee River, the ditches constituted waters of the United States.

To prepare the site for construction, the ditches needed to be dredged and filled, and the County applied to the United States Army Corps of Engineers ("Corps") for a permit as required by the Clean Water Act ("CWA"), 33 U.S.C. § 1344(a) - (f)(2). The National Environmental Policy Act ("NEPA") also required the Corps consider whether its action would have a significant impact on the human environment before it issued a permit. The County limited the permit application to 535 acres for the Scripps Research Park, which was only one part of the larger development plan for 1,919 acres. It asked the Corps to consider this permit independently from the rest of the plan and from any other future development that might result from the project. The Corps evaluated the proposal and issued the permit. The Corps also concluded that it was not necessary to prepare an Environmental Impact Statement ("EIS") because the project would not have a significant impact on the environment.

The Florida Wildlife Federation and the Sierra Club (collectively "Florida Wildlife") challenged the permit issued by the Corps in the United States District Court for the Southern District of Florida. They asked the court to find the permit invalid and to require the Corps to prepare an EIS. Florida Wildlife and the Corps both filed a motion for summary judgment.

The court considered three arguments made by Florida Wildlife: 1) that the Corps avoided a finding of significance by unlawfully segmenting the project, 2) that it was arbitrary and capricious for the Corp to find that Phase I had independent utility, and 3) that the Corps failed to consider the full environmental concerns of the project, including direct, indirect and cumulative impacts under NEPA.

NEPA requires a federal agency to prepare an EIS for any major federal action that has a significant impact on the environment. The court found that the Corps violated the anti-segmentation rule prohibiting a federal agency from evading its responsibilities by evaluating a project based on its individual components rather than on the cumula-

tive effect of the project as a whole. The Corps' behavior was contrary to the underlying policy and intent of NEPA.

The Corps argued that Phase I of the project, the research facility, had independent utility from the rest of the project, and was thus a separate project. The court agreed with Florida Wildlife's argument that the Corps determination was arbitrary and capricious. It determined that the Corps' finding of "independent utility" was a rationalization employed to secure the permit as soon as possible. The court held that this behavior by the Corps undermined the purposes of NEPA.

The court also agreed with Florida Wildlife on the third issue regarding the Corps' insufficient consideration of the impacts of the project under NEPA. Even if the Corps did not unlawfully segment the project and its finding of independent utility was supported, the law still requires the Corps to address the "direct, indirect and cumulative impacts on all Federal interests within the purview of the NEPA statute." The court found that the Corps did not sufficiently address these impacts because it limited the project analysis to the impacts of the research facility without considering the impacts of the future and foreseeable development that would most likely occur if the plan for the facility was approved.

In light of its findings, the court ruled for Florida Wildlife, and granted their motion for summary judgment. The court then ordered both parties to submit memoranda addressing the issue of remedies.

Charles Sweet

Sierra Club v. U.S. Army Corps of Engineers, 399 F.Supp. 2d 1335 (Fla. Dist. Ct. 2005) (granting a preliminary injunction to enjoin any further authorizations under a general development permit that allowed certain wetland dredging and filling for the purposes of "suburban development" without meeting particular statutory requirements of the Clean Water Act).

In the District Court for the Middle District of Florida, the Sierra Club and the Natural Resources Defense Council ("Sierra Club") submitted motions in June 2004 to enjoin a regional general development permit issued in Northwest Florida by the United States Army Corps of Engineers ("Corps"). The regional permit in question ("SAJ-86") allowed for 48,150 acres of development including thousands of homes and other residential, commercial, recreational, and institutional projects. Much of the anticipated construction required the discharge of dredged materials into the wetlands. Sierra Club's complaint alleged that the Corps issued SAJ-86 in violation of the Clean Water Act ("CWA") and the National Environmental Policy Act. In assessing the need for a preliminary injunction, the district court found that the Sierra Club established that: (1) there is a substantial likelihood of Si-