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Nat'l Wildlife Fed'n v. Norton, 332 F. Supp. 2d 170 (D. D.C. Aug. 20, 2004)

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remanded the easement issue to the Forest Service to consider under its FLPMA obligations.

Katherine Iverson

Nat'l Wildlife Fed'n v. Norton, 332 F. Supp. 2d 170 (D. D.C. Aug. 20, 2004) (invalidating a Clean Water Act permit where the permit is based on an invalid Endangered Species Act Biological Opinion).

The United States Army Corps of Engineers ("Corps") issued a permit to Florida Rock Industries ("Florida Rock") for the operation of a limestone mine near Ft. Meyers, Florida pursuant to the Clean Water Act ("CWA"). The mine site consisted of approximately 6000 acres, over 2300 acres of which were jurisdictional wetlands. Florida Rock proposed to excavate approximately 276 acres and fill approximately fifty-seven acres of jurisdictional wetlands.

The United States Fish and Wildlife Service ("FWS") listed the Florida panther as endangered in 1967. In accordance with the Endangered Species Act ("ESA"), the FWS, along with several other agencies, coordinated recovery planning. The inter-agency committee developed a Habitat Preservation Plan ("HPP") in 1986 to outline those areas of habitat essential to the panthers' future survival and self-sustenance. The HPP strongly discouraged any development of essential panther habitat areas and the proposed mine site was located on a site identified as an essential panther habitat. Pursuant to the CWA, Florida Rock applied to the Corps for a CWA "dredge and fill" permit in September 1997. Following objections by the FWS and the Environmental Protection Agency ("EPA"), Florida Rock reconfigured the site to include a wildlife corridor to facilitate panther migration and agreed to leave a large wetland undisturbed. The EPA withdrew its original objections and the FWS issued a Biological Opinion ("BioOp") stating the proposed mine posed "no jeopardy" to the panther. In February 2003, the Corps relied solely on the "no jeopardy" finding of the BioOp to issue an Environmental Assessment or ("EA") concluding the project met the requirements of the CWA. Additionally, consistent with the National Environmental Policy Act ("NEPA"), the Corps determined a full Environmental Impact Study ("EIS") was not necessary for the project.

National Wildlife Federation, Florida Wildlife Federation, and Florida Panther Society (collectively "NWF") filed suit against the United States Department of the Interior in June 2003, alleging FWS's BioOp and the Corps' issuance of Florida Rock's permit violated the ESA, NEPA, CWA, and the Administrative Procedure Act ("APA"). Particularly, NWF claimed the permit violated the CWA because of the preclusion of issuing permits that pose jeopardy to endangered species' habitats. Both parties filed motions for summary judgment, and the United

States District Court for the District of Columbia addressed each of NWF's allegations.

The court held the FWS acted in an arbitrary and capricious manner by issuing the BioOp. The ESA prohibits any federal agency from authorizing, funding, or otherwise carrying out a project that will jeopardize the continued existence of a listed endangered species. The court noted the FWS must convey a rational connection between facts and a "no jeopardy" finding. In this case, the FWS failed to establish a rational connection for its "no jeopardy" determination, thus rendering the BioOp invalid.

The court also invalidated the EA as a result of the invalid BioOp. The CWA prohibits issuance of a permit when potential jeopardy to continued existence of an endangered species exists. The Florida panther relied on wetlands as its primary habitat, and the proposed project threatened to adversely affect such wetlands. The EA prepared for the proposed project pursuant to the CWA requirements did not adequately address such potential jeopardy, but rather relied on invalid assessments, rendering the EA invalid by extension.

The court further held the Corps acted arbitrarily and capriciously with respect to the NEPA by failing to require an EIS for the proposed project. The NEPA mandates every federal agency prepare an EIS when a proposed action significantly affects the quality of the environment. A number of factors determine the significance of an action, including the cumulative impacts of the action, impacts to endangered species, unique characteristics of the project area, and the degree of controversy surrounding the project. The court noted any one of these factors could be enough to label an action as "significant." However, relying on the invalid BioOp, the Corps issued a "Finding of No Significant Impact" ("FONSI") for the project. The court held the Corps did not adequately articulate its reasoning for issuing the FONSI and the Corps should not rely upon an invalid BioOp as the basis for the FONSI.

Pursuant to the court's holdings, the court granted summary judgment for NWF and denied the Department of Interior's motion for summary judgment. The court declared both the BioOp and the EA invalid and remanded the documents to the FWS and the Corps, respectively. Finally, the court declared Florida Rock's CWA permit invalid in light of the invalid BioOp and EA.

Suzanne Knowle

Pa. Mun. Auths. Ass'n v. Horinko, 292 F. Supp. 2d 95 (D. D.C. 2003)
(holding the denials and modifications to National Pollutant Discharge Elimination System permits both constituted final agency action and the district court lacked subject matter jurisdiction over the Clean Water Act permitting disputes because exclusive jurisdiction rested in the Circuit Court of Appeals pursuant to the Clean Water Act).