

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

CASE NO. 05-80339-CIV-MIDDLEBROOKS/JOHNSON

FLORIDA WILDLIFE FEDERATION, a Florida not-for-profit corporation; and **SIERRA CLUB, INC.**, a not-for-profit corporation,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, and **COLONEL ROBERT M. CARPENTER**, District Engineer, in his official capacity,

Defendants.

_____ /

PLAINTIFFS' REPLY MEMORANDUM OF LAW ON REMEDIES

The Federal Defendants' and the Intervenors' Memorandums of Law on the issue of remedy erroneously contend that the Court has absolutely no discretion to fashion an appropriate remedy in the instant case because remand to the Corps without instruction is the only remedy. This contention has no basis in law, is inconsistent with the intent and purpose of the CWA and NEPA and completely ignores the clear law on the Court's powers and the scope of its jurisdiction, as described in Envtl. Def. Fund v. Marsh, 651 F.2d 983, 1005-06 (5th Cir.1981). Defendants ignore the abundance of authority supporting both injunctive relief and an order instructing the Corps to prepare an EIS where, as is in the instant case, it is found that the project may cause a significant impact to the human environment. This Court has the authority and discretion to fashion any remedy which would ensure the Defendants' and the Intervenors' compliance with Federal law - including Plaintiffs' requested relief of an Order (1) setting aside the permit; (2) enjoining any further development activity authorized by the permit, as well as any vertical construction in jurisdictional areas already filled; and (3) directing the preparation of an EIS. Plaintiffs have in fact taken an interim position of compromise in their request for remedy because, not only does this Court have the discretion to grant Plaintiffs' requested remedy, this Court has the discretion to Order the discharged pollutants removed from the

jurisdictional waters and the site completely restored.¹

The APA In Context

The Defendants contend that challenges to final agency action under the APA limit the court to only one remedy – “hold unlawful and set aside agency action, findings, and conclusions” that are found to be defective under the statutory standards of review. 5 U.S.C. § 706(2). This claim is untenable, as courts have the authority to craft appropriate injunctive and declaratory relief under the APA. See, e.g., National Wildlife Federation v. Espy, 45 F.3d 1337, 1343 (9th Cir. 1995) (“The court’s decision to grant or deny injunctive or declaratory relief under [the] APA is controlled by principles of equity.”).

Defendants rely on Florida Power and Light Co. v. Lorian, 105 S.Ct. 1598, 1607 (1985) and Pollgreen v. Morris, 770 F.2d. 1536 (11th Cir., 1985) to support their contention that Plaintiffs can not seek an EIS or injunctive relief. But the issue in these cases was whether the Court, in an APA case, may hear a case *de novo* or base the hearing on the record below. In Pollgreen, the 11th Circuit recognizes that a reviewing Court could provide a remedy without remanding to the agency and commented that review outside the record was appropriate by the district court when determining whether injunctive relief should issue. 770 F.2d. at 1545.

Defendants also mistakenly rely on Fed. Power Comm’n v. Transcontinental Gas Pipe Line Corp., 423 US 326, 333 (1976) and Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 US 519, 544 (1978) neither of which has anything to do with NEPA, the APA or environmental permits. In Fed. Power, the Supreme Court overruled an appeals court order directing the Federal Power Commission to perform a detailed investigation into the facts underlying a delivery about natural gas distribution among several regulated companies, and then to enter a second order resolving the subject by a specified time. The appeals court had no such authority, beyond upholding or vacating the agency’s order as to the dispute. Id at 333-334. Vermont Yankee stands for the proposition that courts should not intrude into an agency’s discretionary decision-making process, but does so in the context of ruling that an appellate court did not have the authority to enjoin the Atomic Energy Commission to employ specific evidentiary – type procedures beyond those required by statute or due process during its

¹ Wilson v. Amoco Corp., 989 F.Supp. 1159, (D.Wyo.,1998). (If court finds a violation of the CWA, it may order any relief necessary to secure compliance.). Port of Portland v. Water Quality Ins. Syndicate, 796 F.2d 1188 (9th Cir. 1986). (Federal Water Pollution Control Act imposes on polluters a duty to clean up waters they have polluted.)

rule-making proceedings. Neither these, nor any of the cases cited by Defendants, address the Court's authority to issue an injunction to remedy the existing and prevent further violations of NEPA and the CWA.²

The Court's Authority and Discretion To Direct Action Upon Remand

If a court finds sufficient evidence in the existing NEPA document that the proposed project actually may have significant impact on the environment, it can and should order the agency to prepare an environmental impact statement. Fritiofson v. Alexander, 772 F.2d 1225, 1238 (5th Cir. 1985); Citizen Advocates for Responsible Expansion v. Dole, 770 F. 2d 423, 439 (5th Cir. 1985). An EIS *must* be prepared if substantial questions are raised as to whether a project . . . *may* cause significant degradation of some human environmental factor." Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1998); Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir. 1992); Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998); Ocean Advocates v. USACOE, 402 F.3d 846, 871-872 (9th Cir. 2004). As detailed in Plaintiffs initial brief on remedies, it is inescapable from a review of the record before the Court that this project will have a significant impact on the human environment. (Plaintiffs Brief on Remedies at 11-15).

Need and Authority for Injunctive Relief

Defendants claim that there is no need for an injunction because the Corps has notified the applicant to "stop further work in navigable waters." (Corps Brief at 5). This Notice, coming almost two weeks after the Court's September 30th Order, is too ambiguous and bereft of direction or command to ensure compliance with NEPA and the CWA. It does not preclude construction on the already filled areas, and allows further expenditure of resources towards building the "catalyst", thwarting the purpose of NEPA. See Sierra Club v. Marsh 872 F.2d 497, 504 (1st Cir. 1989); Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir.1972).

The claim that only the Corps, but not the Court (unless by way of Writ of Mandamus), has the discretion to determine whether to enjoin construction authorized or enabled by the

² The same is true for Federal Power Comm. v. Idaho Power Co., 344 US 17, 73 S. Ct. 85, 97 L. Ed 15 (1952) (1952 case, where Court of appeals had no authority delete condition placed on approval of power line *where the agency had legal discretion to apply said condition*. 344 US at 21-23); Camp v. Pitts, et al., 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973)(error for court to remand matter to agency with directions to conduct evidentiary hearing where such hearing not provided for by statute.

invalid permit, is supported by only “the Defendants’ opinion” (Corps Brief at 5), but no legal authority. That opinion is refuted by Envtl. Def. Fund v. Marsh, 651 F.2d 983, 1005-06 (5th Cir.1981)³. Also, in Arkansas Nature Alliance, Inc. v. USACOE 266 F.Supp.2d 876 E.D.Ark.,2003, clarified by Arkansas Nature Alliance, Inc. v. USACOE. 266 F.Supp.2d 895 (E.D.Ark.,2003), environmental group challenged issuance of letter of permission (LOP) and nationwide permit authorizing modifications to low-water bridge sought by developers under NEPA and Rivers and Harbors Act. The court found that removal of the bridge would be an appropriate remedy, and ordered the bridge be returned to its original low water dimensions. While the court stayed this portion of its ruling pending appeal, the court later found an injunction precluding further island development was warranted during permitting process, and that an EIS was required, and thus enjoined the developers from any further construction while NEPA reviews were ongoing.

In Save Greers Ferry Lake, Inc. v. Dep’t of Defense, 255 F.3d 498, 501 (8th Cir. 2001), the court was not hindered in crafting a remedy for a NEPA violation where numerous boat docks had already been constructed pursuant to the action invalidated by the Court:

The boat docks that have already been constructed ... under permits issued ... may remain on the Lake, and they may be maintained to prevent movement or deterioration but may not be used for any recreational purposes, unless and until the Corps implements a new shoreline management plan in full accordance with NEPA and lawfully issues new permits for those docks If they may not be so authorized and permitted and if the Corps does not take such action within one year after the date of this order, then the subject boat docks shall be removed by whoever owns them as of that one-year anniversary date.....⁴

Clean Water Act

Defendants reliance on Preserve Endangered Areas of Cobb’s History, Inc. (PEACH) v. USACOE, 87 F.3d 1242 (11th Cir. 1996), which found that the citizens suit provision of the

³ “The comprehensiveness of the court’s equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command.” Wienberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982). (In shaping equity decrees, trial court vested with broad discretionary power) Lemon v. Kurtzman, 411 U.S. 192, 200 (1973); (Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.) Swann v. Charlotte-Mecklenburg Bd. Of Educ., 402 U.S. 1, 15 (1971). (District courts enjoy broad discretion in awarding injunctive relief.) National Mining Ass’n v. USACOE, 145 F.3d 1399, 1408 (D.C. Cir. 1998).

⁴ See also, Ocean Advocates v. United States Army Corps of Engineers, 402 F.3d 846, 871 (9th Cir. 2005) (finding that the fact hat construction of oil refinery dock platform was already complete would not limit the Court’s ability to fashion an appropriate remedy.)

CWA is not available as against the Corps, is irrelevant, as this is not a CWA citizens suit. The lack of an existing CWA suit does not preclude the court from granting injunctive relief under its equitable powers or those granted under the Declaratory Judgment Act, mandamus under 28 U.S.C., or the All Writs Act. Defendants are asking this Court to allow a violation of the CWA. Plaintiffs did not initially seek remedy under the citizen suit provision of 33 U.S.C. § 1365. *See Hill v. Boy*, 144 F.3d 1446, 1449 Fn.7 (11th Cir. 1998).⁵ However, this Court cannot order a remedy that causes a party to be in violation of the law. The CWA prohibits the discharge of any pollutant, including dredged spoil or other fill material, into navigable waters unless authorized by a CWA permit. 33 U.S.C. § 1251(a).

Apparently trying to argue that there is no environmental harm requiring an injunction, Scripps cites Plaintiffs' counsel's statement at the September 26, 2005 hearing out of context - "[i]f this were a permit for just 535 acres, just the ditches...we probably wouldn't be here." (Scripps Memo at 2). But the rest of the statement is that "[i]f this were a permit for just 535 acres, just the ditches and it wasn't here, it was somewhere else, it wasn't surrounded, ... by Corbett and Loxahatchee and Hungryland and the Loxahatchee Slough and it wasn't surrounded by all that, we probably wouldn't be here.". Location and surrounding lands matter.

Scripps also makes an unsubstantiated claim that "the mitigation measures ... in the permit improve environmental conditions on the site by expanding the existing open quarry to create almost 60 acres of surface water management ponds, establishing new wetlands..., and creating wide vegetative buffers of diverse native upland species." This statement is not supported by the record. In fact, the EPA expressed "concerns that the proposed mitigation will not adequately compensate for Project impacts and will result in poor habitat." R. 1308. The Fla. Department of Environmental Protection noted a high potential for impacts on Mecca because the existing mining activities uncovered the surficial aquifer, making it susceptible to pollution from stormwater and industrial pollutants. R.1445-6 and 2686.

Declaratory Judgment Act

In order to effectuate the purpose and intent of NEPA and the CWA, this court has the discretion under the Declaratory Judgment Act to enjoin the project and remand the matter to the

⁵ Plaintiffs advise the Court that they did, in fact, send the Defendants a statutory 60 day CWA letter thirty (30) days prior to filing the Complaint. The Plaintiff's claims under the CWA (the same claims brought under the APA), having accrued during the pendency of this case, can also be brought by supplemental complaint if the Court feels that it requires such jurisdiction. See correspondence attached as Exhibit "___."

Corps to conduct a proper EIS or deny the application. In this case Plaintiffs sought and were granted declaratory relief. 28 U.S.C. 2201 and 2202 authorize this Court to grant “[f]urther necessary or proper relief based on a declaratory judgment” ... after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.” § 2202. Courts may enforce a declaratory judgment by granting supplemental and injunctive relief. Securities Industry Asso. v Board of Governors of Federal Reserve System, 628 F Supp 1438 (DC Dist Col. 1986) (Declaratory Judgment Act empowered District Courts to grant supplemental relief which includes injunctive relief.)⁶ Under the Declaratory Judgment Act this court has the authority and discretion to issue injunctive relief.

Mootness Cases Are Illustrative of The Court’s Broad Injunction Authority

Mootness cases are illustrative of the Court’s broad authority to order injunctive relief under NEPA. Columbia Basin Land Protection Ass’n v. Schlesinger, 643 F.2d 585, 591 n.1 (9th Cir. 1981), rejected a mootness claim in a NEPA action involving 191 electricity transmission line towers which had already been built and operating for several years. The court noted that if it were to invalidate the agency action, it had the power to remove all of the towers and the transmission line. The court reasoned that if the fact that the towers were built and operating were enough to make the case non-judicial, then the agency could merely ignore the requirements of NEPA, build its structure before a case gets to court, and then hide behind a mootness claim. *Id.* at 592.⁷ In Lake Wylie Water Resources Protective Ass’n v. Rodgers Builders, Inc. 621 F.Supp. 305 D.C.S.C. 1985, the Court, while ultimately denying a motion for preliminary injunction, responded to a mootness claim by noting that the “advanced stage of completion dredging and construction activities” did not render plaintiff’s motion moot as the “court retains the equitable power to order the removal of all offending materials should plaintiff prevail on its motion for a preliminary injunction.” *Id.* Similarly, in Airport Neighbors Alliance, Inc. v. U.S. 90 F.3d 426 (C.A.10 1996), the court rejected a mootness claim in a NEPA case

⁶ See also Powell v. McCormack, 89 S. Ct. 1944 (1969) (Declaratory relief can lay the predicate for injunctive relief); Thompson v Baltimore & O. R. Co., 59 F Supp 21 (DC Mo. 1945) (Court may grant additional relief by way of injunction.); Springfield v McCarren, 549 F Supp 1134 (DC Vt. 1982) (District Court may enforce declaratory judgment through "further necessary and proper relief", including injunction).

⁷ “If the fact that the towers are built and operating were enough to make the case nonjusticiable, ..., then the BPA (and all similar entities) could merely ignore the requirements of NEPA, build its structures before a case gets to court, and then hide behind the mootness doctrine. Such a result is not acceptable.” *Id.*

concerning a completed airport runway improvement, because the runway could be closed or restrictions imposed on its use pending compliance with NEPA. Id.

This Case Does Not Involve the Corps Prosecutorial Discretion, But the Court's Equitable Authority to Fashion a Remedy For a Legal Violation

The claim that Heckler v. Cheney, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985) precludes an injunction fails completely. Heckler is not a case under NEPA, the CWA or any other environmental statute. It precluded judicial intrusion into the Food and Drug Administration's exercise of its "prosecutorial discretion" not to seek to stop lethal chemical injections as a means of implementing the death penalty in Texas and Oklahoma. The Corps' suggestion that the ruling in Heckler "should apply here" is supported by no legal authority.

Mandamus

Col. Carpenter has a duty to comply with NEPA. He issued the permit, and, as the head of the agency, must revoke it. 28 U.S.C. 1361 permits an action to compel an officer of the United States to perform his duty, granting district courts:

"original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 USCS § 1361

Remedy by mandamus can be coextensive with the remedy available under § 706(1) of the APA to permit review of discretionary agency action. Conservation Law Foundation, Inc. v. Clark, 590 F. Supp. 1467, 1472 (D. Mass. 1984). **The scope of mandamus relief includes review of discretionary agency action.** *Id. citing Davis Assocs., Inc. v. H.U.D.*, 498 F.2d at 385, 389 (1st Cir. 1974). ("under . . . § 706(1) . . . a court may grant mandatory relief, whether the plaintiff seeks mandamus or mandatory injunction or uses some other language to designate mandatory relief"). When, as here, the mandatory injunction that is sought is essentially in the nature of mandamus its issuance "could be based on mandamus or the APA or both." Carpet, Linoleum and Resilient Tile Layers v. Brown, 656 F.2d 564, 567 (10th Cir. 1981). Mandamus jurisdiction permits flexibility of remedy, so that request for injunctive and declaratory relief is not inconsistent with jurisdictional basis under 28 USCS § 1361. Brown v Schlesinger 365 F Supp 1204, (1973, ED Va).

All Writs Act

This Court can remand and issue an injunction under the All Writs Act.:

“(a) [A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule may be issued by a justice or judge of a court which has jurisdiction.” 28 U.S.C. § 1651.

The exercise of authority under the All Writs Act “is in the nature of appellate jurisdiction’ where directed to an inferior court, Ex parte Crane, 30 U.S. 190, (1832), and extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected.” Cf. Ex parte Bradstreet, 32 U.S. 634, 7 Pet. 634, 8 L. Ed. 810 (1833). This “grant includes the traditional power to issue injunctions to preserve the status quo while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction” and “empowers a federal court to issue injunctive or other appropriate relief “in aid” of its jurisdiction.” Thousand Friends of Iowa v. Iowa DOT, 257 F. Supp. 2d 1204, 1207-1208 (D. Iowa 2002)

EIS Required: The Impacts Will be Significant

After maintaining throughout the permitting process and in pleadings filed with the court that an electric power substation (to be built on Corbett) was not needed until subsequent phases of the project (See Amicus Brief at 20), Defendants informed the Court and the Plaintiffs just last week that the substation is in fact required to serve the 535 acre site. In February of this year, days after issuing the challenged permit, the Corps provided comments on the substation to the U.S. Fish and Wildlife Service regarding the requested change at Corbett to allow the substation. See Appendix A. In the letter, the said the following about the substation’s impacts:

“If the land transfer occurred and Seminole Pratt Whitney Road is connected to the Beeline Highway and a new power substation is constructed, future development would occur in the area at a much faster rate . . . Mecca ...and ... Vavrus ... would become developable, and additional [sic] road would need to be constructed to access the future additional development. . . The Corps believes that the land trade to facilitate a transportation corridor and a power source does not have independent utility from the remaining future development on the 1919 acre Mecca ...site, from the development on ...Vavrus ..., and the construction of future roads because the remaining development is dependent upon access to the sites and a power source for its success. It is understood that any proposed future road construction or expansion, as well as any wetland impacts associated with the construction of a power substation will be evaluated once it is proposed. However, the construction of a power station and a road would lead to an increase in development and road construction in the area. These points should be included in the cumulative impacts analysis.” (emphasis added) “

The Corps' also said:

“The cumulative impacts associated with the 1.63 acre land transfer should include the construction of Seminole Pratt Whitney Road and any potential construction that could happen in the reasonably foreseeable future. This could include further development of the 1919 acre Mecca Farms property, development on the Vavrus Ranch or possibly an increase in the development rate on the Park of Commerce site located north of the intersection of Seminole Pratt Whitney Road and the Beeline Highway.”

Inexplicably, the Corps failed to analyze any of these issues in their permitting decision and has argued to the contrary throughout this proceeding.

The determination of “significance” requires consideration of context and intensity. Relevant to a project’s “intensity” is “the degree to which the effects on the quality of the human environment are likely to be highly controversial.” 40 C.F.R. § 1508.27. The effects of an action are "highly controversial" when there is "a substantial dispute [about] the size, nature, or effect of the major Federal action....”Georgia River Network v. USACOE, 334 F.Supp.2d 1329, 1338 (N.D.Ga. 2003); Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998) "Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data or where the collection of such data may prevent 'speculation on potential ... effects. The purpose of an EIS is to obviate the need for speculation...." Sierra Club v. United States Forest Serv., 843 F.2d 1190, 1195 (9th Cir.1988)) (citation omitted).⁸ Here, as in Friends of the Earth v. USACE, 109 F. Supp. 2d 30, 43 the Corp’s inadequate consideration of the direct, indirect and cumulative impacts of the entirety of the project Corps “provided less than the full picture.” Similarly, as in Friends, there are “too many unanswered questions.” The Court’s Order on Cross Motions For Summary Judgment notes that the element of controversy would have to be re-evaluated by the Corps. (Order at fn. 37). The disagreement and confusion among the agency and the applicant about the size, scope and nature of the project⁹, make this a controversial project, for which an EIS should be conducted.

Assumption of the Risk

⁸ In Ocean Advocates, 402 F.3d 846, 871 the Court required the preparation of an EIS when it found that the Corps “should have realized that uncertainty surrounded the potential for increased traffic based on the undetermined additional berthing capacity at the ...refinery, the magnitude of this change and its relationship to the increased risk of oil spills, and unknown, long-term projections for increased traffic and the risk of an oil spill.”

⁹ See discussion of the various, contradictory local, state and federal views of the scope and size of the project at Order at 8, 10-11.

On February 28, 2005, Plaintiffs notified the Corps of their intent to sue, request to suspend/ postpone agency action. (See February 28, 2005 Notice of Intent to Sue)(Appendix B). Intervenor County was copied on that Notice. Intervenors have been on notice and fully aware of the potential (and later actual) ongoing litigation since that date. Ultimately the County and its partner Scripps decided to commence construction, notwithstanding the threat, and later, pendency of this action. In a resolution passed May 24th, the County authorized construction to proceed even in light of pending litigation:

[T]he Board is convinced that, in the event a future unfavorable court ruling should limit development of the Biotechnology Research Park or require removal of some or all of Scripps' Permanent Facilities, the public investment in the [research park] and the [Scripps facility] can be protected and recouped by the sale of the Mecca property." (Appendix C)(County Resolution 2005-1037).

The County fully understood and assumed the risk of constructing the project, understood the potential consequences of an adverse judicial ruling, attempted to mitigate the risk of those consequences, and chose to assume the risk of building under the permit. Any potential public harm could have been voided if the County and Scripps had simply awaited the Court's ruling in this matter, which it knew the Court had agreed to enter on an expedited basis, before further committing taxpayer funds in undertaking construction. Their decision to proceed otherwise should not deprive this Court of its equitable authority to enjoin further construction.

Conclusion

WHEREFORE, the Court should enter an Order (1) setting aside the permit; (2) enjoining any further development authorized by the permit, and any vertical construction in jurisdictional areas already filled; and (3) directing the preparation of an EIS which analyzes all of the impacts of all reasonably foreseeable project and impacts identified in the Court's Order of Sept. 30, 2005 or in the administrative record. The Court should retain jurisdiction as necessary to enforce this Order consistent with the September 30, 2005 ruling on summary judgment.

Respectfully submitted this 25th day of October, 2005.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic mail and United States mail on this 25th day of October, 2005, to all parties listed below.

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