Environmental Law

by Travis M. Trimble*

In 2005 the Eleventh Circuit courts addressed issues of regulatory interpretation of the Clean Air Act ("CAA");[1] compliance with the National Environmental Policy Act ("NEPA")[2] in connection with the development of wetlands; and a conflict between the Federal Emergency Management Agency's ("FEMA") coastal flood insurance program and the Endangered Species Act ("ESA").[3] First, the Eleventh Circuit Court of Appeals invalidated a rule of the Alabama Department of Environmental Management that exempted certain stack emissions that otherwise violated the State Implementation Plan under the CAA.[4] Also, the United States District Court for the Northern District of Alabama heard one of several cases arising out of an enforcement dispute between the Environmental Protection Agency ("EPA") and power companies over the companies' upgrades to existing power plants.[5] The court held that, for purposes of the EPA's rule excluding routine maintenance, repair, or replacement projects from the CAA's preconstruction permit requirement, any project that is routine throughout the industry and does not increase the maximum hourly capacity of the plant to emit pollutants can qualify for the exclusion.[6] In a case concerning the Clean Water Act ("CWA")[7] and NEPA, the United States District Court for the Southern District of Florida ruled that the United States Corps of Engineers, in issuing a CWA section 404 permit allowing a county to fill jurisdictional waters for development, had improperly

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1. 42 U.S.C. §§ 7401-7671 (2000).
2. 42 U.S.C. §§ 4321-4370f (2000).
3. 16 U.S.C. §§ 1531-1544 (2000).
4. Sierra Club v. Tennessee Valley Auth., 430 F.3d 1337, 1340 (11th Cir. 2005).
5. United States v. Alabama Power Co., 372 F. Supp. 2d 1283, 1285 (N.D. Ala. 2005).
6. *Id.* at 1307.
7. 33 U.S.C. §§ 1251-1387 (2000).

segmented a portion of the development from the larger development plan for permitting purposes.[8] Additionally, the court held that the Corps improperly concluded that an Environmental Impact Statement was not even required for the segmented portion.[9] Finally, in an ESA case, the Southern District of Florida enjoined FEMA from administering its National Flood Insurance Program in portions of the Florida Keys because the plan facilitated development that degraded the habitat of several endangered or threatened species.[10]

I. CLEAN AIR ACT

In *Sierra Club v. Tennessee Valley Authority*,[11] the Eleventh Circuit held that a regulatory safe harbor first established informally, and then formally, by the Alabama Department of Environmental Management ("ADEM"), which exempted "de minimis" violations of the stack emissions opacity requirement under Alabama's State Implementation Plan ("SIP") of the Clean Air Act ("CAA"),[12] was an illegal modification of the SIP and was thus invalid.[13] The court also held that opacity data from a continuous opacity monitoring system ("COMS") could not be used to establish violations of the opacity rule prior to May 20, 1999.[14] Finally, the court held that sovereign immunity protected the Tennessee Valley Authority ("TVA") from the assessment of civil penalties.[15]

Alabama maintains a SIP administered by ADEM to enforce the national ambient air quality standards developed by the EPA under the CAA.[16] One of the SIP regulations prohibits the discharge of particulate matter of greater than twenty percent opacity.[17] Also, under the SIP, the approved method of measuring opacity is known as "Method 9," which is essentially a visual observation by a certified observer.[18]

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8. Florida Wildlife Fed. v. United States Army Corps of Eng., 401 F. Supp. 2d 1298, 1304-05, 1313, 1315 (S.D. Fla. 2005).

9. *Id.* at 1323-33.

10. Florida Key Deer v. Brown, 364 F. Supp. 2d 1345, 1348-49, 1361 (S.D. Fla. 2005).

11. 430 F.3d 1337 (11th Cir. 2005).

12. 42 U.S.C. §§ 7401–7661 (2000).

13. 430 F.3d at 1339-40.

14. *Id.* at 1340.

15. *Id.*

16. *Id.* at 1341.

17. *Id.* The court explained that opacity is a measure of the extent that a plume of smoke reduces the transmission of light. *Id.* A plume with twenty percent opacity blocks twenty percent of light passing through it. *Id.*

18. *Id.* at 1341-42. The court noted that Method 9 has limited effectiveness because a typical source is tested not more than fifteen times a year and cannot be tested at night.

Around October 2002, ADEM began informally applying a two percent de minimis rule as a safe harbor from the twenty percent opacity limit. Under this rule, stack emissions, as measured by COMS, were allowed to exceed the opacity limit for up to two percent of the plant's total operating hours in each quarter. ADEM formally adopted this rule as a regulation in October 2003.[19]

Also, in May 1999, ADEM adopted a "credible evidence rule" that allowed a regulatory violation of the SIP to be established by "any credible evidence or information."[20] The EPA mandated that each state with a SIP adopt such a rule to clarify that a test method expressly included in a SIP, such as Method 9, was not to be the exclusive method by which a violation could be established.[21]

The subject of the lawsuit in *Sierra Club* was a TVA operated power plant in Colbert, Alabama. As part of its operating permit, the TVA was required to install and maintain a COMS in each of the plant's stacks.[22] The TVA used the COMS data, among other things, to take advantage of the two percent de minimis rule.[23] Seeking declaratory relief, injunctive relief, and civil penalities, the Sierra Club and the Alabama Environmental Council sued the TVA in September 2002, alleging that from 1997 through 2002 there were 8,933 violations of the twenty percent opacity limit set out in the SIP. The plaintiffs used the TVA's COMS data, which was submitted to ADEM in connection with the de minimis rule, to establish the violations.[24]

The Eleventh Circuit court reversed the grant of summary judgment based on the two percent de minimis rule.[25] The court noted that the CAA prevents a state from unilaterally modifying a SIP regulation without EPA approval.[26] Because ADEM's two percent de minimis rule had never been submitted to the EPA for approval and because the rule effectively modified the twenty percent opacity limitation in the SIP by allowing emissions to exceed the limit for up to two percent of the plant's operating hours per quarter, the court held that the two percent rule was invalid.[27]

Id. at 1342.

19. *Id.*
20. *Id.* at 1342-43.
21. *Id.*
22. *Id.* at 1340.
23. *Id.* at 1342.
24. *Id.* at 1339, 1343.
25. *Id.* at 1349, 1357.
26. *Id.* at 1346.
27. *Id.* at 1349. The court stated that:

As to the alleged violations that occurred prior to May 20, 1999,[28] however, the court affirmed the grant of summary judgment. The court held that prior to the adoption of the "credible evidence rule" on that date, Method 9 (visual observation by a certified inspector) was the sole method of determining compliance with the opacity limitation. Because the Sierra Club's case relied exclusively on COMS data to establish violations, it could not prove violations prior to the effective date of the credible evidence rule.[29]

In *United States v. Alabama Power Co.* ("*Alabama Power*"),[30] the United States District Court for the Northern District of Alabama interpreted the scope of the EPA's exclusion from the CAA's pre-construction permit requirement for projects with the purpose of routine maintenance, repair, and replacement ("RMRR").[31] The court held that the exclusion applies to projects that are routine within the industry, though not necessarily routine at any particular pollutant-emitting unit, and to projects that do not increase the maximum hourly emissions capacity of the unit.[32]

Alabama Power is one of several power plant "life extension project" enforcement actions that the EPA began against various power companies in 1999.[33] In that case, as in others, the EPA contended that Alabama Power constructed new, or made modifications to, electrical power generating plants in Alabama without obtaining New Source Review permits, thereby violating the CAA's Prevention of Significant Deterioration ("PSD") provisions.[34]

> [b]y using an informal, non-public, undocumented "interpretation" method of revising the SIP before 2003, ADEM short-circuited the important protections against uninformed and arbitrary rule-making, and it attempted to avoid entirely EPA oversight of the SIP process . . . . For all of these reasons, ADEM's practice of employing the 2% de minimis rule to determine violations of the 20% opacity limitation using COMS data was invalid under the CAA . . . .

Id. The court also noted that in 2003, ADEM submitted its two percent rule to EPA for review. *Id.* at 1348.

28. *Id.* at 1357.

29. *Id.* at 1351-53. The plaintiffs argued that the federal credible evidence rule, effective in April 1997, automatically became part of every SIP. *Id.* The court disagreed, noting, among other reasons, that the EPA included in the regulation a separate provision requiring every state to adopt, through the SIP modification process, its own credible evidence rule, which the court stated would have been unnecessary if the federal rule had automatically amended each SIP. *Id.* at 1352.

30. 372 F. Supp. 2d 1283 (N.D. Ala. 2005).

31. *Id.* at 1307.

32. *Id.* at 1306-07.

33. *See id.* at 1304-05.

34. *Id.* at 1285; 42 U.S.C. §§ 7470-7492 (2000).

The court's interlocutory ruling in *Alabama Power* established the scope of the RMRR exclusion to be applied in the case.[35] The court described the issues as follows: "(1) the correct legal test for determining a physical change, including the correct legal test for determining routine maintenance, repair, and replacement; and (2) the correct legal test for determining a significant net emissions increase."[36] As to the first issue, the EPA contended that the RMRR exclusion applied only to projects that were routine at the particular unit under evaluation for a permit, while Alabama Power argued that "routine" meant routine in the industry, though not necessarily at any one unit.[37] As to the second issue, the EPA's procedure called for the plant operator to estimate the future actual annual emissions of the unit after the project, compared to its actual emissions before the project, to determine whether an increase in emissions would occur.[38] Alabama Power contended that a project resulted in an emissions increase only if it increased the maximum hourly emissions capacity at a plant.[39]

The court reached its decision primarily by comparing two prior district court opinions that reached contrary holdings on the same two issues: *United States v. Ohio Edison*[40] and *United States v. Duke Energy Corp*.[41] On the first question, whether the project constituted RMRR and thus did not require a pre-construction permit, the court in *Ohio Edison* ruled in favor of the EPA's position that the RMRR exclusion applied only to projects that were routine at the particular unit in question.[42] The court based its holding on the fact that under the plain language of the CAA, the permit requirement applied to *any* physical change at a unit.[43] Therefore, any regulatory exemption to the statute must be narrowly construed to avoid conflicting with the statute's clear purpose.[44]

On the other hand, in *Duke Energy* the court held that the RMRR exclusion applied to projects that were considered routine throughout the industry.[45] The court reasoned that prior to the CAA amendments of

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35. 372 F. Supp. 2d at 1285-86, 1306-07.
36. *Id.* at 1285-86.
37. *Id.* at 1289.
38. *Id.* at 1290.
39. *Id.*
40. 276 F. Supp. 2d 829 (S.D. Ohio 2003).
41. 278 F. Supp. 2d 619 (M.D.N.C. 2003); *Alabama Power*, 372 F. Supp. 2d at 1292.
42. *See Alabama Power*, 372 F. Supp. 2d at 1289, 1293-94. The characterizations of the holdings of *Ohio Edison* and *Duke Energy* are those of the court in *Alabama Power*.
43. *Id.* at 1294; *see* 42 U.S.C. § 7411(a)(4) (2000) (emphasis added).
44. *See Alabama Power,* 372 F. Supp. 2d at 1293-94.
45. *Id.* at 1289, 1293-94.

1977, which introduced the PSD pre-construction permit requirement, the EPA already excluded from its new source performance requirement regulations those modifications that were the result of maintenance, repair, or replacement that were "routine for a source category."[46] When Congress amended the CAA in 1977 with the PSD provisions, it explicitly defined "construction" under the 1977 provisions to include "modification" as defined in the 1970 CAA.[47] Thus, in *Duke Energy* the court held that Congress intended to amend the CAA within the existing regulatory framework, under which, for the purposes of the CAA, a modification did not include RMRR that was routine for an entire source category.[48]

As to the second question, how to calculate an emissions increase for purposes of the permit requirement, the court again sided with the EPA in *Ohio Edison*, holding that the agency's "actual to projected future actual" emissions test was proper and consistent with the intent and purpose of the CAA.[49] The test captured as much new construction or modification to existing units as possible.[50] Specifically, the test captured modifications that would result in greater utilization of the plant and, thus, greater emissions due to longer hours of operation.[51]

On the other hand, in *Duke Energy* the court employed an analysis to the increased emissions test that was similar to its analysis of the RMRR test.[52] The court noted that the EPA promulgated a regulation that preceeded the 1977 amendments containing the pre-construction permit requirement, which excluded from the "physical change" category (requiring a permit) a change solely to the plant's hours of operation or production rate.[53] The court decided that this exclusion required the EPA to hold the hours of operation constant in any emissions calculation, which dictated that emissions be calculated based only on a maximum hourly rate.[54] As with the RMRR test, the court concluded that because this regulatory "hours of operation" exclusion pre-existed the 1977 amendments and because Congress explicitly incorporated the "modification" definition from the 1970 CAA in the 1977 amendments, Congress intended for "modification" to receive the same regulatory

46. *Id.* at 1294-95; *see* 40 C.F.R. § 60.14(e)(1) (2005).
47. *Alabama Power*, 372 F. Supp. 2d at 1295; *see* 42 U.S.C. § 7411(a)(4).
48. *Alabama Power*, 372 F. Supp. 2d at 1295.
49. *Id.* at 1290, 1297.
50. *Id.*
51. *Id.*
52. *Id.* at 1298.
53. *Id.*; *see* 40 C.F.R. § 52.21(b)(2)(iii)(f) (2005).
54. *Alabama Power*, 372 F. Supp. 2d at 1298.

interpretation under the 1977 provisions.[55] Thus, the court held that the EPA was required to determine whether an emissions increase had occurred by comparing the maximum hourly emissions capacity of the unit before and after the modification.[56]

In *Alabama Power* the court found the *Duke Energy* opinion persuasive.[57] The court concluded that the EPA was not entitled to deference in its interpretation of the CAA and its regulations.[58] After considering the extent to which deference should be applied under United States Supreme Court precedent,[59] the court concluded that the EPA was not entitled to deference, primarily because the agency had not been consistent in applying its regulations.[60] The court stated that the "EPA's arguments sound more in 'litigation position,' which is never entitled to *Chevron* deference, than they do in agency implementation/interpretation of ambiguous statutory language, which is entitled to *Chevron* deference."[61]

II. CLEAN WATER ACT/NATIONAL ENVIRONMENTAL POLICY ACT

In *Florida Wildlife Federation v. United States Army Corps of Engineers,*[62] the United States District Court for the Southern District of Florida granted summary judgment to the plaintiffs on their claim that the United States Corps of Engineers ("the Corps") violated the National Environmental Policy Act ("NEPA")[63] and the Clean Water

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55. *Id.*
56. *Id.*
57. *Id.* at 1305-06.
58. *Id.* at 1306.
59. *See* United States v. Mead Corp., 533 U.S. 218 (2001); Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).
60. *Alabama Power*, 372 F. Supp. 2d at 1306. The court noted that since the initiation of the 1999 enforcement actions the EPA has adopted or proposed two additional rules governing the applicability of the PSD permit provisions: a 2003 rule that would treat any modification costing less than twenty percent of the replacement cost of the unit as routine maintenance, and a 2005 rule applying to particulate matter emissions that would apply only in twenty-eight eastern states. *Id.* at 1299, 1301. The court also noted that prior to 1999, the EPA provided conflicting guidance or interpretations of its regulations. *Id.* at 1306. On March 17, 2006, the United States Court of Appeals for the District of Columbia Circuit invalidated the 2003 rule, holding that the rule was contrary to the plain language of the CAA. New York v. Envtl. Prot. Agency, 2006 U.S. App. LEXIS 6598, at *8 (D.C. Cir. 2006). Like the court that issued the *Ohio Edison* opinion, the District of Columbia Circuit gave an expansive meaning to the phrase "any physical change" in CAA § 111(a)(4). *Id.* at *30. However, the District of Columbia Circuit did not address the precise question at issue in *Alabama Power*.
61. *Alabama Power*, 372 F. Supp. 2d at 1306.
62. 401 F. Supp. 2d 1298 (S.D. Fla. 2005).
63. 42 U.S.C. §§ 4321–4370 (2000).

Act ("CWA")[64] by issuing a CWA section 404 permit to Palm Beach County without issuing an Environmental Impact Statement ("EIS").[65] The court held that in granting the permit to the county to fill agricultural ditches in a wetland area for the development of 535 acres of a planned 1919-acre research park, the Corps improperly segmented the 535-acre tract from the remainder of the planned development for the purposes of its initial Environmental Assessment ("EA").[66] Furthermore, the court stated that even if the segmentation had been proper, the Corps nevertheless failed to adequately examine the reasonably foreseeable indirect and cumulative effects of the 535-acre project, and thus, the Corps failed to take the required "hard look" at all relevant environmental concerns.[67] Finally, the court held that the Corps's EA was deficient because the Corps's alternatives and benefits analysis did not match the scope of its impact analysis.[68]

In late 2003 Palm Beach County, Florida purchased a 1919-acre site on which to locate a research park. The county planned to develop the park for biomedical, technological, and pharmaceutical research with a Scripps Research Institute as its centerpiece.[69] At the time the county acquired the site, Scripps was committed to locating its facility on a portion of the tract, while other development was anticipated but not confirmed.[70]

The 1919-acre site was historically a wetland area, but had been converted to agriculture by the construction of ditches to drain the site. The ditches are present throughout the site, run north to south every 360 feet, are permanently inundated, and connect to a canal that is a tributary of a fork of the Loxahatchee River. As such, the ditches are waters of the United States.[71]

In May or June 2004 the county applied for a permit to fill 21.3 acres of drainage ditches on a 535-acre portion of the site. The county identified this tract as the Scripps Research Park, which included the Scripps facility, a town center with commercial and residential construction, a health care facility, roads, and other development.[72] In

64. 33 U.S.C. §§ 1251-1387 (2000).
65. *Florida Wildlife Fed.*, 401 F. Supp. 2d at 1301-02, 1333.
66. *Id.* at 1304-05, 1333.
67. *Id.* at 1333.
68. *Id.*
69. *Id.* at 1302-03.
70. *Id.* at 1303-04. In announcing the development, the county pointed to Scripps's business model, including the potential development of a biotech/pharmaceutical industry cluster. *Id.* at 1303.
71. *Id.* at 1304.
72. *Id.* at 1305.

February 2005 after a notice and comment period, the Corps issued an EA for the 535-acre tract, concluding that the county had shown the "independent utility" of the Scripps Research Park from the remainder of the 1919-acre planned development and that proposed construction on the tract would not have a significant impact on the environment. Based on this conclusion, the Corps did not prepare an EIS and issued the permit.[73]

The plaintiffs, the Florida Wildlife Federation and the Sierra Club, filed suit asking the court to declare the permit invalid and to require the Corps to prepare an EIS.[74] The plaintiffs claimed that the Corps acted arbitrarily and capriciously by failing to consider the impact of the entire 1919-acre development when it concluded that the 535-acre portion of the project would not have a significant impact on the environment. More specifically, the plaintiffs claimed that the Corps unlawfully segmented the project to avoid a finding of significance; that the Corps's finding that the 535-acre portion had independent utility was arbitrary and capricious; and that the Corps's EA failed to consider and take a hard look at all environmental concerns, including impacts, controversy, and alternatives.[75]

The court first held that the Corps's issuance of the 404 permit for the 535-acre portion of the development constituted a major federal action under the NEPA.[76] The court rejected the Corps's argument that it did not have sufficient control and responsibility over the entire project to be required to consider the impact of the entire project, in part because the Corps "conceded that it was aware of plans for future development [beyond that of the 535-acre tract]; that it will have jurisdiction over the next phases of development; and that it anticipates applications for those phases."[77]

The court also held that the Corps unlawfully segmented the 535-acre tract from the larger development by authorizing the extension of a road within the tract that the Corps knew would ultimately be connected to roads outside the tract and would cross wetlands to do so.[78] The court agreed with the plaintiffs that by authorizing the road within the tract, the Corps "pre-determined the ultimate alignment of the connecting PGA [Boulevard] extension . . . through wetlands, and preclude[d] the ability

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73. *Id.* at 1306-07.
74. *Id.* at 1301-02.
75. *Id.* at 1310-11.
76. *Id.* at 1311.
77. *Id.* at 1312.
78. *Id.* at 1315-16.

to thoroughly evaluate alternative [road] alignments."[79] The court stated that the purpose of the anti-segmentation rule is to prevent an agency from evading its responsibilities under the NEPA by artificially dividing a major federal action into smaller components.[80] Therefore, the court held that although other aspects of the larger development—including the placement of roads—had not been formally proposed, the Corps's approval of the road segment within the 535-acre tract was "sufficiently contrary to the underlying policy of NEPA to warrant review of the planned extensions . . . ."[81]

The court also rejected the Corps's alternative argument that permitting the 535-acre portion of the development was proper because that portion had independent utility in that it could be constructed absent the construction of other projects.[82] The court stated that "[t]he inescapable conclusion from this record is that the Research Park Project was conceptualized as an integrated whole, progressing in phases, and that the 535-acre project was never intended to stand alone—not, that is, until time came to apply for a CWA permit."[83] The court noted that in the county's initial submissions to the Corps, the 535-acre portion of the project was discussed as being integrated with future development on the rest of the tract and that the independent utility concept was introduced for the first time when other agencies began to question the environmental impacts of the 1919-acre project.[84] The court found that the independent utility argument was developed "post-hoc as an avenue to limit and expedite permit review."[85]

The court also ruled that even if the project had not been improperly segmented and the Corps's finding of independent utility were supported by the record, the Corps still failed (1) to adequately address the indirect and cumulative effects of the 535-acre portion of the project in its EA review; and (2) to properly balance its benefits-to-impacts analysis.[86] First, the court held that the Corps failed to consider indirect effects of the permit issuance.[87] Indirect effects are those "'caused by the [federal] action and are later in time or farther removed in distance, but are still reasonably foreseeable.'"[88] The court focused on the fact that

79. *Id.* at 1315.
80. *Id.* at 1313.
81. *Id.* at 1316.
82. *Id.* at 1318.
83. *Id.*
84. *Id.* at 1318-20.
85. *Id.* at 1321.
86. *Id.* at 1323, 1333.
87. *Id.* at 1324, 1326.
88. *Id.* at 1324.

the 535-acre Scripps Research Center portion of the project was initially proposed for the specific purpose of inducing other development on the larger tract, and thus rejected the Corps's argument that development would have occurred on the larger tract without the issuance of the 404 permit.[89] As a result, the court concluded that "[t]he Corps failed to consider and take a 'hard look' at the growth-inducing effects of the proposed project as required by NEPA."[90]

Second, the court held that the Corps failed to consider the cumulative impact of the 535-acre project.[91] Cumulative impacts are those which result from "the incremental impact of the [federal] action when added to other past, present, *and reasonably foreseeable future actions* . . . ."[92] The Corps again relied on a variation of the independent utility concept and argued that it was required only to consider cumulative impacts where other actions "are 'so interdependent [on the action in question] that it would be unwise or irrational to complete one without the others.'"[93] The court instead focused on the foreseeability of the remainder of the project, noting, among other things, that more than two months before the permit in question was issued, the county and the Corps were discussing the next phases of the 1919-acre development.[94]

Finally, the court determined that the Corps had used an improper comparison when evaluating the alternatives and benefits of the development.[95] The Corps was required to consider, and did consider, alternatives to the project and their potential benefits as part of the EA. However, the Corps's regulations required it to consider the impacts, benefits, and alternatives within the same scope.[96] The court found that while the Corps limited its analysis of potential impacts of the project to the 535-acre tract, the Corps compared these to the benefits of the entire 1919—acre proposed development.[97] Also, in performing its alternatives analysis, the Corps "improperly incorporated consideration of the entire Research Park Project rather than limiting it to the

89. *Id.* at 1324-26.
90. *Id.* at 1326.
91. *Id.* at 1327-28.
92. *Id.* at 1326.
93. *Id.* at 1327. The Corps's argument comes from *Park County Resource Council v. United States Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987). The district court distinguished that case on its facts. *Florida Wildlife Fed.*, 401 F. Supp. 2d at 1327-28.
94. *Florida Wildlife Fed.*, 401 F. Supp. 2d at 1327-28.
95. *Id.* at 1331.
96. *Id.*
97. *Id.*

scope of the proposal before the Corps."[98] For these reasons, the court granted summary judgment to the plaintiffs.[99]

III. ENDANGERED SPECIES ACT

In *Florida Key Deer v. Brown*,[100] the United States District Court for the Southern District of Florida granted summary judgment to the plaintiffs on their claim that the Federal Emergency Management Agency's ("FEMA") administration of its National Flood Insurance Program ("NFIP") in the Florida Keys violated the Endangered Species Act ("ESA")[101] because the program jeopardized several endangered or threatened species.[102] This litigation had been pending since 1990. In 1994 the court ordered FEMA to consult with the Fish and Wildlife Service ("FWS") pursuant to the ESA. In 1997 the FWS determined that FEMA's administration of the NFIP jeopardized several endangered species, and FWS proposed "reasonable and prudent alternatives" ("RPA") to allow the NFIP to continue while protecting the species.[103] The plaintiffs challenged the RPA, contending that the RPA also violated the ESA. In 2003 the plaintiffs again issued an opinion that the NFIP jeopardized the same species and issued RPA that were identical to the 1997 RPA. The plaintiffs amended their action to challenge the 2003 RPA, contending that the RPA and FEMA's adoption of them were

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98. *Id.*

99. *Id.* at 1333. In a subsequent remedies phase, the court set aside the permit issued to the county and remanded the matter to the Corps for further proceedings consistent with the present case. Florida Wildlife Fed. v. United States Army Corp of Engs., 404 F. Supp. 2d 1352, 1366-67 (S.D. Fla. 2005). The court also enjoined the county from further construction on the site, with certain exceptions for work that was already in place or under way when the case was filed, pending adequate environmental review. *Id.*

100. 364 F. Supp. 2d 1345 (S.D. Fla. 2005). Notwithstanding the case name, the plaintiffs were the National Wildlife Federation and other groups who brought the case on behalf of eight endangered or threatened species of animals and plants in the Florida Keys. *Id.* at 1348.

101. 16 U.S.C. §§ 1531—1534 (2000).

> The ESA requires all federal agencies, in consultations with FWS, to use their authority to further the goals of the ESA by carrying out programs for the conservation of endangered and threatened species . . . . [w]hen any action authorized, funded or carried out by a federal agency may potentially affect a listed species, that agency must consult with FWS to insure that the agency's activities are not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.

Florida Key Deer, 364 F. Supp. 2d at 1350; *see* 16 U.S.C. § 1536(a)(1-2) (2000).

102. *Florida Key Deer*, 364 F. Supp. 2d at 1348-49, 1361.

103. *Id.* at 1348.

arbitrary and capricious and violated the ESA because the RPA failed to protect the species threatened by the NFIP.[104]

The court agreed with the plaintiffs on each of their three claims. First, the court held that the FWS's 2003 opinion regarding the threat posed by the NFIP was arbitrary and capricious because it failed to evaluate whether the NFIP continued to jeopardize the listed species after FEMA's implementation of the 1997 RPA.[105] Second, the court held that the 2003 RPA proposed by the FWS were arbitrary and capricious because, for several reasons, they failed to protect against jeopardy to the species.[106] Finally, the court held that FEMA's adoption of the 2003 RPA was arbitrary and capricious because FEMA did not independently evaluate the effectiveness of the RPA as proposed by FWS.[107] In a separate opinion that was issued later, the court remanded the matter to FEMA and the FWS for further proceedings, and enjoined FEMA from issuing flood insurance for new developments in the critical habitat of the listed species until FEMA could demonstrate compliance with its order issued in the present case and with the ESA.[108]

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104. *Id.* at 1348-49. The jeopardy caused by FEMA's insurance program is presumably due to the development that it facilitates, though the court does not discuss this connection.

105. *Id.* at 1354.

106. *Id.* at 1354-58. Specifically, the court agreed with the plaintiffs that the 2003 RPA illegally relied on voluntary measures for compliance, failed to protect against habitat loss and fragmentation, and did not otherwise account for the cumulative effects of permitted development projects within the listed species' habitat; therefore, the 2003 RPA failed to protect against jeopardy to the species as a result of the NFIP. *Id.*

107. *Id.* at 1358-59. The court also held in favor of the plaintiffs on two related issues: that the 2003 RPA failed to protect against adverse modification of the critical habitat of the silver rice rat, a listed species, and that FEMA failed to implement any conservation plan for the listed species as required by the ESA. *Id.* at 1359-61.

108. Florida Key Deer v. Brown, 386 F. Supp. 2d 1281, 1294 (S.D. Fla. 2005).