

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-13297-F

SIERRA CLUB, et al.,
Plaintiffs-Appellees

v.

LT. GEN. ROBERT VAN ANTWERP, CHIEF OF ENGINEERS,
UNITED STATES ARMY CORPS OF ENGINEERS, et al.,
Defendants

and

MIAMI-DADE LIMESTONE PRODUCTS ASSOCIATION, INC., VECELLIO & GROGAN,
INC., APAC - FLORIDA, INC., FLORIDA ROCK INDUSTRIES, INC., AND TARMAC
AMERICA LLC, et al.,
Intervenor Defendants-Appellants,

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(THE HONORABLE WILLIAM M. HOEVELER)
(District Court No. 03-23427-CIV-HOEVELER)

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Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, undersigned counsel for federal defendants hereby certifies that to the best of her knowledge, the following is a complete list of persons and entities who have an interest in the outcome of this case, *Sierra Club v. Van Antwerp*:

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APAC Holdings, Inc.;

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APAC-Mississippi, Inc.;

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APAC-Southeast, Inc.;

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No. 07-13297-F

SIERRA CLUB, et al.,
Plaintiffs-Appellees

v.

LT. GEN. ROBERT VAN ANTWERP, CHIEF OF ENGINEERS,
UNITED STATES ARMY CORPS OF ENGINEERS, et al.,
Defendants

and

MIAMI-DADE LIMESTONE PRODUCTS ASSOCIATION, INC., VECELLIO &
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Intervenor Defendants-Appellants

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29,
the United States respectfully submits this brief as *amicus curiae*.

INTRODUCTION AND INTEREST OF THE UNITED STATES

In a March 22, 2006, order granting summary judgment, the district court
held that a decision by the United States Army Corps of Engineers (“Corps”) to

issue permits authorizing limestone mining by ten companies in the Lake Belt Region of Southern Florida violated the Clean Water Act (“CWA”), the National Environmental Policy Act (“NEPA”), and the Endangered Species Act (“ESA”).

R: 73. Compliance with the district court’s March 2006 remand order entails that the Corps (1) engage in formal consultation with the United States Fish and Wildlife Service (“FWS”) on impacts of the action on wood storks under the ESA; (2) prepare a Supplemental Environmental Impact Statement pursuant to NEPA; and (3) reevaluate the permits pursuant to the CWA.

The Corps has completed the ESA consultation and is nearing completion of its NEPA analysis. On April 19, 2006, the Corps requested initiation of formal consultation with the FWS pursuant to the ESA, 16 U.S.C. § 1536(a)(2)-(c), on the permits. R: 241 at 9. As part of the consultation process, the Corps prepared a biological assessment and on August 17, 2006, submitted it to the FWS in accordance with 50 C.F.R. § 402.14(c). R: 241. On September 1, 2006, the FWS issued a Biological Opinion concluding that the 10-year mining plan and permits at issue are not likely to jeopardize the continued existence of the wood stork. R: 241 at 58. The FWS anticipated incidental take in the form of harm and harassment of an estimated 18 fledgling wood storks over the duration of the 10-year permits; the Biological Opinion included an incidental take statement

authorizing such take. R.241 at 59. In the Biological Opinion, the FWS stated that mitigation measures that are part of the proposed action may fully offset this loss and that as a result of mitigation measures, the value of foraging habitat in the area for wood storks will be greater than the habitat available prior to mining activities outlined in the 2002 permits. R: 241 at 60, 62. The FWS's issuance of the no jeopardy Biological Opinion completed the ESA formal consultation process required by the district court's decision.

With respect to NEPA, the Corps solicited comments from the public on scoping and asked that comments be submitted between October 4 and November 17, 2006. On August 17, 2007, the Corps issued for public comment a Draft Supplemental Environmental Impact Statement addressing the issues identified in the district court's summary judgment order. The 60-day public comment period for this draft will close in mid-October 2007. The public comments will be considered by the Corps in its preparation of a final Supplemental Environmental Impact Statement. Depending on the volume and nature of the comments, the Corps could issue a new decision on remand as early as January 2008.

In the March 2006 merits order, the district court retained jurisdiction to determine further remedies while the Corps proceeds on remand. R: 387. After further proceedings on remedy, including evidentiary hearings, on July 13, 2007,

the district court issued an order vacating the permits. The court stayed part of its vacatur order, however, to allow some mining to continue. Thus, the court's July 13, 2007, order is effectively an injunction that prohibits mining within a setback area defined by the court.

The substantial burden of the court's remedial order falls on four companies that own or operate three facilities where mining must cease or be substantially curtailed, and their employees, as well as those in South Florida who require use of the limestone products for construction and road building. The four companies required to cease operations and other mining companies seeking permits, intervenors in this case, promptly appealed after the July 13, 2007, order.

The federal government is not pursuing an appeal.^{1/} However, the United States has a continuing and substantial interest in the judicial review of the Corps' permit decisions. The United States agrees with intervenors that the district court erred in many instances: the district court ignored the limited judicial review of agency action under the Administrative Procedure Act ("APA") and misstated the Corps' responsibilities under the relevant environmental statutes and regulations, such as the CWA, ESA and NEPA. The court's language also disturbingly

^{1/} On September 11, 2007, the federal defendants filed a protective notice of appeal. We have filed a motion requesting voluntary dismissal of that appeal.

suggests that it may have already prejudged the administrative proceedings on remand and the potential outcome of that process.

ARGUMENT

I. The District Court Erred by Failing to Defer to Agency Action Under the APA.

Judicial review of the Corps' decision to issue the CWA permits is limited under the arbitrary and capricious standard of the APA. 5 U.S.C. § 706(2). "This standard of review provides the reviewing court with very limited discretion to reverse an agency's decision." *City of Oxford, Georgia v. FAA*, 428 F.3d 1346, 1352 (11th Cir. 2005). "The reviewing court may not substitute its judgment for that of the agency but must, instead, defer to the agency's technical expertise." *Id.* *Accord Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 377-78 (1989).

As this Court stated:

"[a]dministrative decisions *should . . . not [be set aside] simply because the court is unhappy with the result reached.*" The agency must use its best judgment in balancing the substantive issues. The reviewing court is not authorized to substitute its judgment for that of the agency concerning the wisdom or prudence of the proposed action.

Fund for Animals, Inc. v. Rice, 85 F.3d 535, 542 (11th Cir. 1996) (quoting *North Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1538-39 (11th Cir. 1990) (footnotes and citations omitted) (emphasis added)). See also *Preserve Endangered Areas of Cobb's History, Inc. v. United States Army Corps of Engineers* (hereafter "*PEACH*"), 87 F.3d 1242, 1246 (11th Cir. 1996) ("The role of the court is not to conduct its own investigation and substitute its own judgment for the administrative agency's decision").

Despite the district court's lip service to these principles, its analysis repeatedly jettisoned the proper limited role. Instead, the court substituted its own judgment for that of the Corps in many instances. For example, the court stated that its "role is to examine the record and determine if the Defendants' have met their obligations to protect the environment for future generations." R: 387 at 177. This is incorrect. In fact, the court's proper role is limited to determine whether the Corps' issuance of the challenged CWA permits was reasonable and based on the relevant statutory and regulatory factors. *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43. And, where, as here, the relevant issues involve technical expertise, particular deference is owed to the agency's findings and judgments. *Marsh*, 490 U.S. at 377-78; *Environmental Coalition of Broward County, Inc. v. Meyers*, 831 F.2d 984, 986 (11th Cir. 1987). Indeed, the Corps is much more than just an

environmental protector. Under its own regulations, the Corps' CWA decisionmaking should "reflect the national concern for both protection and utilization of important resources." 33 C.F.R. § 320.4(a). Therefore, the Corps must consider and balance other factors along with environmental concerns, including, for example, economic, mineral needs, considerations of property ownership and the needs and welfare of the people. *Id.*^{2/}

A example of the court's error is its unfounded criticism of the Corps for eliminating from further consideration the alternative of considering each permit individually and treatment of the Corps' action as if it were approval of the original proposal for 50-year permits, rather than the limited 10-year permits that the Corps actually approved. R: 73 at 97-99, 104-05; R: 387 at 144-46. NEPA case law supports the Corps' approach here of evaluating simultaneously pending permit applications collectively, in an aggregate manner. *See, e.g., Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976) (NEPA "may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time"; "when several proposals for coal-related actions that will have cumulative or synergistic environmental impact on a region are pending

^{2/} NEPA imposes no requirement to elevate environmental concerns over other factors (*see infra* at Section B) and ESA obligations have been discharged (*see infra* at Section D).

concurrently before an agency, their environmental consequences must be considered together”). Furthermore, the permits issued are unquestionably for a 10-year period, not for the 50-year period proposed by the permit applicants as much of the district court’s analysis supposes.

A court errs in failing to defer to the Corps’ determination as to the scope of the environmental evaluation it undertakes for NEPA purposes. *Id.* at 412 (scope of statement properly left to the informed discretion of federal agency). One aspect of that analysis within the Corps’ discretion is the duration of CWA permits. The Corps’ collective approach and shortening of the duration and scope of the permits is reasonable under the APA given the comments opposing the permit applicants’ proposal for 50-year permits, the comprehensive plan for the area developed by the State, and the fact that the environmental risks of aquifer contamination, seepage from the Everglades National Park, and wildlife impacts generally relate to the cumulative activities throughout the entire Lake Belt area, not to individual permits or mining operations.

The court also erred in suggesting that, in future proceedings, it might strip the Corps of any deference because of the Corps’ supposed “past failings” unconnected to the present case. R: 387 at 34-35. The court improperly muses that the Corps’ errors in this case, combined with an unrelated General Accounting

Office report on compensatory mitigation and congressional testimony about the Hurricane Katrina disaster, justify not according any future deference to the Corps in this case. R: 387 at 34-35 n.78; *see also* R: 387 at 18-19 (citing a 35-year old statement by Sen. Muskie in congressional debate to support a suggestion that the Corps is not entitled to any deference here). The court also suggests that the Corps is owed no deference because it uses limestone products for its own projects and that Corps' experts are entitled to no deference because they are like experts hired by private parties to give a specific expert opinion. R: 387 at 13 n.30.

The court's suggestions are fundamentally at odds with administrative law and practice. An agency is not stripped of discretion simply because a court requires it to reevaluate a decision or because it has multiple congressional mandates. Furthermore, the lower court's irrelevant ad hominum attacks on the Corps strongly suggest that the court improperly refused to defer to the Corps, and raise serious concerns about the court's impartiality in subsequent proceedings.

Furthermore, although the court purports not to dictate the agency's future decision (R: 387 at 35), the court's language and analysis suggest otherwise. For example, the court considers evidence outside the administrative record and undertakes its own balancing of public interest factors set forth in Corps regulations, 33 C.F.R. § 320.4, (R: 387 at 153-170), concluding: "The Court has

determined that the adverse environmental effects of this mining, particularly the risk of contamination of the Wellfield and Aquifer, are sufficiently harmful such that almost any ‘public and private need’ for the mining would be outweighed.”

R: 387 at 154. *See also id.* at 5 (expressing “significant doubt” that supplemental environmental review is proceeding properly); *id.* at 16 (finding, based on consideration of post-decisional materials, “the evidence clearly establishes that the CWA and ESA compel denial of these mining permits”); *id.* at 34 (court “strongly recommend[s]” that on remand the Corps “take note of what Court has described as the “inevitable conclusion of the evidence”); *id.* at 35 n.80 (“[S]ubsequent evidence suggests that some of those violations persist today”).^{3/}

Thus, contrary to fundamental principles of administrative law, the court actually does attempt to dictate the outcome of the remand proceedings. In administrative review, a court is not empowered to reach its own conclusions

^{3/} In the July 2007 remedy decision, the district court repeatedly relies on extra-record evidence, including information that post-dated the challenged decision to support its finding of arbitrariness. While a court is entitled to extra-record evidence outside the record in an equitable proceeding to determine whether injunctive relief should issue pending remand, the court here improperly used the extra-record evidence to reinforce its merits decision and to find further errors in the Corps’ 2002 decision. Review of the merits of the Corps’ decision is properly confined to the administrative record before the agency when it made the decision. *E.g., Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

based on such de novo inquiry; rather, the agency is tasked on remand to make the findings and initial determination based on its expertise. *See Gonzales v. Thomas*, 547 U.S. 183, 187 (2006); *INS v. Ventura*, 537 U.S. 12, 18 (2006). After determining that an administrative agency has been arbitrary or failed to consider relevant factors, the court's inquiry ends: the case must be remanded to the agency for further action consistent with the correct legal standards. *See, e.g., South Prairie Constr. Co. v. Local No. 627*, 425 U.S. 800, 803-04 (1976); *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952).

Finally, the court improperly determined the public interest with respect to these permits absent any statutory or regulatory mandate. Congress has entrusted the Corps, not the courts, to determine the public interest and the law is clear that the Corps' conclusions are entitled to considerable deference. As this Court stated:

In its review, a court should give deference to the agency determination. This is particularly appropriate in the case of complex environmental statutes such as the Clean Water Act. A court should not substitute its own views for the decision reached by the agency. These principles of judicial review are particularly appropriate where the agency decision under review includes a "balancing" process like the "public interest" review provided for by the Corps' regulations.

Environmental Coalition of Broward County, 831 F.2d at 986 (internal citations omitted). *Accord Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d

1438, 1455 (1st Cir. 1992) (“Under the ‘public interest’ review, the Corps conducts a general balancing of a number of economic and environmental factors and its ultimate determinations are entitled to substantial deference”).

II. The District Court Misapprehends the Role of NEPA.

It is well settled that NEPA’s requirements are purely procedural, not substantive. *See, e.g., Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 756 (2004); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989); *City of Oxford*, 428 F.3d at 1352. NEPA “merely prohibits uninformed -- rather than unwise -- agency action.” *Robertson*, 490 U.S. at 351. “If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.” *Id.* at 350. In other words, NEPA does not require agencies to elevate environmental concerns over other appropriate considerations. *Baltimore Gas & Elec. v. Natural Resources Defense Council*, 462 U.S. 87, 103 (1983). Consistent with these principles, the Supreme Court held in *Robertson*, 490 U.S. at 352-353, that NEPA requires only that an agency discuss possible mitigation measures in sufficient detail to ensure that environmental consequences have been fairly evaluated. NEPA does not require that an agency actually take any action to mitigate the adverse effects of federal actions.

The district court disregarded these basic NEPA principles and improperly treated NEPA as if it imposed substantive obligations on the Corps to protect the environment. An example of this erroneous approach is in the court's discussion of mitigation.^{4/} Although the district court recites that NEPA requires an adequate discussion of mitigation, it does not stop with finding such procedural error. Rather, it finds that the Corps violated NEPA by not mitigating adverse effects sufficiently, stating: "The Corps' EIS identified various serious impacts, as noted above, and thus the Corps was required, by NEPA, to first attempt to avoid these impacts and then to minimize whatever was unavoidable, and, finally, to mitigate for any unavoidable adverse effect." R: 73 at 78; *see also* R: 387 at 39 (in remedy decision describing the NEPA violations as including the Corps' failure "to ensure that the targeted area for mitigation and restoration would be acquired" and that the Corps improperly balanced the permit applicants' needs against long term productivity of the environment); *id.* at 107-115 (criticizing under NEPA Corps' balancing of applicant's needs against environmental impacts). The court goes on

^{4/} Although the CWA regulations contain mitigation requirements, 33 C.F.R. § 325.4, the district court erred by assuming that NEPA imposed substantive requirements. Furthermore, the district court replicated its erroneous view of NEPA on other issues, such as suggesting that the Corps violated NEPA by attaching greater weight to economic and social impacts than to purely environmental impacts. R: 73 at 107-110.

to express disapproval of the mitigation ratio the Corps used to determine the amount of required compensation lands, stating “the Court has serious concerns as to whether the final determination of 2.5:1 is adequate to replace the lost value of the wetlands.” R: 73 at 85. The court also opines that the littoral shelves to be constructed around the mining pits are of dubious value and that the per-ton fee that mining interests will be charged to fund mitigation will prove inadequate. R: 73 at 85-90.

In sum, the district court erred by adding substantive obligations to the Corps’ NEPA analysis.

III. The District Court Misunderstands the Corps’ Role and the Evidence with Respect to Water Quality.

The district court also misunderstands the Corps’ and County’s roles with respect to groundwater quality and protection of the County’s drinking water wellfield. That misunderstanding complicates the Corps’ remand proceedings because the district court attempts to assign to the Corps duties that properly rest with local government under the CWA and other relevant statutes.

The district court repeatedly notes that the Corps failed to police the safety of the County’s drinking water. In particular, the court faults the Corps for deferring to the County regarding how to address potential impacts of mining on

the County's groundwater drinking wellfield. *See, e.g.*, R: 387 at 9, 23 n.55, 69 (on water supply issues Corps defers to County on what should have been Corps' responsibility). The district court speculates that the County's official position is the product of improper influence or poor policy decisions and assumes that it is the Corps' responsibility to override the County on these matters. R: 387 at 22-23, 62-69. The court also questions the County's failure to conclude that benzene contamination was caused by mining (R: 387 at 7-8 n.16) and second-guesses the County's decision (supported by the State) to upgrade its water treatment facility to address any possible future threat of contamination due to land use or increased pumping rates (R: 387 at 22-24). In fact, the Corps took the precautionary approach of imposing more stringent setback requirements from the wellfield than was required by the County ordinance. R: 387 at 51-52. Moreover, contrary to the district court's assumption, the Corps' deference to the County's position on drinking water matters is reasonable and appropriate, not arbitrary and capricious.

The regulations implementing the CWA provide:

The primary responsibility for determining zoning and land use matters rests with state, local and tribal governments. The district engineer will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance. Such issues would include but are not necessarily limited to national security, navigation, national economic development, water quality, preservation of special aquatic areas, including

wetlands, with significant interstate importance, and national energy needs. Whether a factor has overriding importance will depend on the degree of impact in an individual case.

33 C.F.R. § 320.4(j)(2). The regulations also provide that the Corps must give due consideration to a local government's "official views as a reflection of local factors of the public interest." 33 C.F.R. § 320.4(j)(1).

Furthermore, under federal law, the State and County, not the Corps, are responsible for providing safe drinking water to residents. The federal Safe Drinking Water Act places primary enforcement responsibility on States; the Corps has no regulatory enforcement role under that Act. 42 U.S.C. § 300h-1.

The district court also erred in asserting that the Corps' "new posture of deferral to the County represents a dramatic change in approach by the Corps." R: 387 at 67-68. To the contrary, as explained above, the regulations provide for the Corps to defer to the County. Moreover, a Corps official, John Studt, who at the time of his testimony was Chief of the South Permits Branch, Regulatory Division in the Corps' Jacksonville District, testified that, consistent with the regulations, the Corps' normal practice is to defer to the position of state and local officials on groundwater and drinking water issues. R: 413, Tr. Vol. 12 at 2583-84.

There is also no sound basis for the court's criticism of the Corps for failing to delay its permit decision until after the County completed studies of potential

risks to drinking water quality and finished reviewing its suite of regulatory and treatment controls. R: 387 at 65-66, 69. The CWA regulations provide that action on a permit application will normally not be delayed pending action by a local agency. 33 C.F.R. § 320.4(j)(1). More importantly, the permits at issue were conditioned on a three-year view allowing changes to be incorporated into the permits, as warranted by changes in the County's regulatory approach or information from further studies. R: 73 at 67-68; R: 411, Tr. Vol. 11 at 2481-83.

In sum, the Corps appropriately deferred to the County's official position that the permits at issue here do not threaten the County's drinking water wellfields. The district court's opinion erroneously suggests that the Corps should displace the County as the primary regulatory authority with respect to groundwater used for drinking. This places the Corps in a difficult position on remand.

The court discounted the protection offered by the 60-day wellfield setback zone – which the Corps had established to meet or exceed County wellfield protection rules – and substituted instead the court's preferred setback zone. The court's decision was based on a report by a Dr. Papadopoulos, despite the lack of any evidence of actual contamination of drinking water by benzene or pathogens associated with permitted mining activities. Intervenors correctly point out that

the district court misinterpreted the evidence before it concerning groundwater quality issues and appropriate setback.

On remand, the Corps is entitled to rely on the views of its own experts, *see Marsh*, 490 U.S. at 377, and, consistent with its regulation, to defer to the County's position on wellfield protection issues. In any subsequent judicial review of the Corps' decision on remand, the Corps' analysis and findings on the technical issues are entitled to deference. *See supra* at 9-11.

IV. The District Court Erred by Refusing to Dismiss the ESA Claims After They Became Moot.

The plaintiffs' ESA claims alleged that the Corps and FWS violated the ESA by failing to engage in formal consultation on the effects of the action on wood storks, a species listed as endangered under the ESA. R: 26 at 49-50.^{5/} The March 22, 2006, decision granted summary judgment on plaintiffs' ESA claims. On September 1, 2006, the Corps completed formal consultation with the FWS's issuance of a Biological Opinion finding that the proposed action would not jeopardize the continued existence of wood storks or adversely modify designated critical habitat.

^{5/} Two ESA claims alleged a failure to consult; count 3 was against the Corps and count 4 was against the FWS.

It is well settled that a claim under the ESA seeking to compel an agency to consult with the FWS becomes moot when the agency and FWS complete the consultation. *See, e.g., Sierra Club v. Glickman*, 156 F.3d 606, 619-20 (5th Cir. 1998); *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 728 (10th Cir. 1997); *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 765 (8th Cir. 2004). Upon completing the formal consultation, federal defendants moved to dismiss the ESA claims as moot. R: 253.

In a March 27, 2007, order, the district court denied the motion to dismiss the ESA claims, suggesting that a claim could not be dismissed as moot after entry of summary judgment. R. 372 at 2-4. The court also suggested that it could grant further relief on the ESA claims. R. 372 at 3.

Contrary to the district court's suggestion, the entry of summary judgment does not preclude a claim from becoming moot. A case must be viable at all stages of the litigation. *C&C Products, Inc. v. Messick*, 700 F.2d 635, 636 (11th Cir. 1983). "If an event occurs while a case is pending that heals the injury and only prospective relief has been sought, the case must be dismissed." *Southern Utah Wilderness Alliance*, 110 F.3d at 127. In *Sierra Club v. Glickman*, the Fifth Circuit held that an ESA claim based on failure to consult was rendered moot by the federal defendant's compliance with a district court order to complete

consultation.^{6/} 156 F.3d at 619-620. Here too, by completing formal consultation, the Corps and FWS provided plaintiffs with the relief they sought and completed the action required to rectify the violation identified in the district court's summary judgment order.

The district court's suggestion that it could properly order some relief in addition to requiring that the Corps and FWS engage in formal consultation for the ESA claims is also erroneous. Plaintiffs alleged that the Corps and FWS violated the ESA by failing to engage in formal consultation. R: 26 at 49-50. Even if plaintiffs had brought a different claim, such a claim would be barred from judicial review in this proceeding because they failed to provide a 60-day notice for any such claims pursuant to 16 U.S.C. 1540(g)(2)(A).^{7/} The 60-day notice is a

^{6/} In other contexts too, courts of appeals have dismissed cases as moot based on events subsequent to the district court's entry of judgment, including mootness resulting from a defendants' compliance with a district court order. *E.g.*, *Westmoreland v. NTSB*, 833 F.2d 1461, 1462-63 (11th Cir. 1987); *United States v. Shenberg*, 90 F.3d 438, 440 (11th Cir. 1996).

^{7/} The notice that the district court held satisfied this requirement (R: 73 at 8) alleged a failure to complete an adequate consultation as of the date of the letter (March 2001) and thus did not challenge the sufficiency of consultations that occurred after that date. In fact, the notice on which the district court relied was insufficient to challenge the failure to engage in formal consultation because the notice letter was not addressed to the Secretary of the Interior, as required under 16 U.S.C. § 1540(g)(2)(A)(k), and because the notice letter preceded the Corps' Record of Decision. Thus, in addition to continuing to exercise jurisdiction over the ESA claims, the district court lacked jurisdiction to reach these claims in the

jurisdictional prerequisite to suit. *E.g.*, *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989) (notice requirement under similar statute is condition precedent to suit); *Save the Yaak Comm. v. Block*, 840 F.2d 714, 721 (9th Cir. 1988) (dismissing ESA claim for lack of jurisdiction because 60-day notice requirement not met).

The district court's error in refusing to dismiss the ESA claims as moot upon completion of formal consultation is not a mere technicality because the court relied on the Corps' initial failure to engage in formal consultation in ordering mining to cease. R: 387 at 131. However, at the time the court issued the remedy order, no injury flowed from failure to engage earlier in formal consultation of the ESA.^{8/} Accordingly, to the extent that the district court relied on the initial failure to consult as a basis for enjoining continued mining, it abused its discretion.

V. The District Court Had Jurisdiction Under the Administrative Procedure Act and 28 U.S.C. § 1331 Over Plaintiffs' Claims.

first place.

^{8/} The district court suggests that the incidental take of an estimated nine wood storks over the initial five years of this project "is directly attributable to the Defendants' violations of the ESA." R: 387 at 131. However, the Biological Opinion completed in September 2006 authorizes the incidental take of 18 fledglings over ten years (an estimated 1.8 storks per year). There is no logical basis for assuming the take would have been avoided had the formal consultation occurred earlier.

Intervenors argue (Rinker Br. at 18-25) that the district court lacked subject matter jurisdiction over plaintiffs' challenge to the Corps' issuance of a permit under section 404 of the CWA because the United States has not waived sovereign immunity to such an action. Contrary to Intervenors' argument, the district court had jurisdiction pursuant to the APA, 5 U.S.C. 701 *et seq.*, and 28 U.S.C. § 1331 over the claims alleging that issuance of the permits violated the CWA. Although the CWA citizen suit provision, 33 U.S.C. § 1365(a), does not waive sovereign immunity for these claims, it does not expressly or impliedly render the APA inapplicable. The CWA citizen suit provision addresses only a failure by EPA to perform a nondiscretionary duty, and there is no evidence that Congress intended to preclude judicial review of discretionary actions, such as issuance of a permit, by either EPA or the Corps under the APA.

In *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme Court held that the judicial review provision of the APA "applies universally" unless review is precluded by another statute. 520 U.S. at 175. The CWA citizen suit provision does not expressly preclude APA review of Corps permit decisions, and there is no indication in the statutory scheme that Congress intended to do so. The provision at issue provides that "any citizen may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator

to perform any act or duty under this chapter which is not discretionary with the Administrator.” 33 U.S.C. § 1365(a)(2).

Plaintiffs’ claims alleging violation of the CWA and implementing regulations in this action do not fall under this provision for two reasons. First, as this Court has previously held, this section is limited to actions against the EPA Administrator and does not provide jurisdiction for an action against the Corps. *PEACH*, 87 F.3d at 1249. Second, the Corps’ determination to issue a permit and the Corps’ determination as to what conditions to place on such permits are discretionary acts, and thus would not fall within the CWA citizen suit provision even if it allowed for suits against the Corps to enforce nondiscretionary duties.^{9/}

^{9/} As numerous courts have held, an action to compel an agency to perform a nondiscretionary duty is limited to compelling the agency to take an action and may not be used as a vehicle to obtain judicial review of the manner in which the agency has acted. *E.g.*, *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 124 S. Ct. 2373, 2380 (2004) (“when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency’s discretion, a court can compel the agency to act, but has no power to specify what the action must be.”); *Scott v. City of Hammond*, 741 F.2d 992, 995 (7th Cir. 1994) (content of agency action is discretionary); *Sun Enterprise Ltd. v. Train*, 532 F.2d 280, 288 (2d Cir. 1976) (no jurisdiction under CWA citizen suit to review the manner in which an agency has performed a mandatory duty). The Corps’ decision in an individual case as to whether to grant or deny a permit application and what conditions to require for issued permits is not mandated by the statute and is thus discretionary.

There is no evidence that Congress in creating a specific citizen suit provision to address actions to compel EPA to perform nondiscretionary duties intended to preclude review under the APA of discretionary permit actions by the Corps. In fact, in *PEACH*, the case in which this Court held that Corps actions were not reviewable under the CWA citizen suit provision, the Court did review such actions under the APA. 87 F.3d at 1247-49. Nor do any of the other cases cited by Intervenors support their contention that Congress intended the CWA citizen suit provision to preclude review of Corps permit decisions under the APA. This Court did not address the issue in *Hill v. Boy*, 144 F.3d 1446 (11th Cir. 1998), where it followed *PEACH* in affirming dismissal of plaintiffs' CWA citizen suit claims. *Hill* did consider plaintiffs' claim under the APA that the Corps' permitting decision was inconsistent with NEPA requirements. *Id.* at 1449-51. In another case on which Intervenors rely, *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, Civ. A. No. 06-01268 (HHK), 2007 WL 1576317 (D.D.C. May 30, 2007), the court dismissed only plaintiffs' claims against the Corps brought under the CWA citizen suit provision and rejected an argument nearly identical to the one made here. The court held that plaintiffs' APA claim challenging the EPA's determination not to veto the Corps permit at issue was not precluded by the CWA citizen suit provision because EPA's decision not to veto

the permit was discretionary, and, under the principles articulated by the Supreme Court in *Bennett*, the citizen suit provision did not demonstrate congressional intent to preclude judicial review under the APA for discretionary actions of EPA.

The same principle applies in this case. The CWA citizen suit provision does not mention the Corps at all, and there is no indication that Congress intended that silence to preclude judicial review of discretionary actions by the Corps, such as issuance of a permit. Intervenors' contention that *Bennett* is distinguishable because the agency involved in *Bennett* was also subject to claims under the ESA to enforce nondiscretionary duties, (Rinker Br. at 23), is meritless. The question, as defined by the Supreme Court in *Bennett*, is whether Congress intended to establish the limits of judicial review of agency actions under the statute, and thus preclude judicial review under the APA. The mere fact that the CWA citizen suit provision does not mention the Corps provides no such

evidence.^{10/} Accordingly, the APA and 28 U.S.C. § 1331 provide jurisdiction over claims challenging the Corps' issuance of CWA permits.

^{10/} The cases cited by Intervenor in which courts have found APA review precluded (Rinker Br. at 21) are also inapposite. In each of those cases, Congress had created an exclusive judicial review regime under the governing statute, which specifically excluded certain claims. The court in each case held that Congress intended that exclusion to also apply to actions brought under the APA. The CWA contains no such exclusions, and thus none support the proposition that congressional intent to preclude APA review can be implied solely from the fact that Congress did not provide a cause of action under the CWA for review of discretionary Corps actions. The Supreme Court has stated, "only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Board of Governors v. MCORP Financial, Inc.*, 502 U.S. 32, 44 (1991) (internal citation omitted).

CONCLUSION

For the foregoing reasons, the ESA claims should be dismissed as moot and this Court should provide guidance in its opinion on the proper application of the legal issues, including the proper standard of review under the APA. The United States will inform the Court when it has completed the remand process.

Respectfully submitted,

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SEPTEMBER 2007
90-8-6-05425

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), I certify that the foregoing Brief for the Federal Appellees is printed in proportionately spaced typeface of 14 points. The brief is double-spaced except for quotations and footnotes. The side, top and bottom margins are one inch. According to the word processing system's tally, the word count for the brief is 6,099 (excluding the Certificate of Interested Persons, Table of Contents, Table of Citations, Certificate of Compliance, and Certificate of Service).

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