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Pa. Mun. Auths. Ass'n v. Horinko, 292 F. Supp. 2d 95 (D. D.C. 2003)

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

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

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

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

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

Suzanne Knowle

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

A consortium of public-owned treatment works ("POTWs") brought suit in the District Court for the District of Columbia against the Environmental Protection Agency ("EPA") alleging that administrators of EPA's Regions III, IV, and VI ("administrators") acted beyond the scope of their delegated authority. The administrators, contrary to national EPA rules, issued regional guidance documents prohibiting the practice of "blending," which falls within a category of practices known as "bypass." The EPA's national standard allows bypass so long as the POTWs meet their National Pollutant Discharge Elimination System ("NPDES") permitted effluent limitations. The administrators prohibited the permitting of outfalls entirely, including the practice of sanitary sewer overflow, which essentially left the POTWs with no available bypass or defenses in some regions.

The administrators asserted the challenged regional guidance documents did not constitute "final agency action" and were not reviewable. In addition, the administrators filed a motion to dismiss, claiming, even if the documents constituted a final agency action, the POTWs' claims were subject to judicial review exclusively in the Circuit Court of Appeals pursuant to section 1369(b)(1)(F) of the Clean Water Act ("CWA").

The court first addressed whether regional NPDES permit modifications or denials constituted final agency action where the EPA remained silent without objection. Final agency action is determined by a two-part test requiring the action (1) mark the consummation of the agency's decision-making process, and (2) the action determines rights or obligations with legal consequences. As a matter of policy, courts do not grant pre-enforcement review if there was not a final agency action.

The court next considered whether NPDES permit denials or modifications constituted final agency action. The court held that issuing regional guidance documents was not final agency action, noting only claims involving permit denials or modifications marked the consummation of an agency's decision-making process and determined legal rights or obligations that yield tangible legal injury. However, the court went on to hold that permit denials and modifications both constituted final agency action and subjected the POTWs' surviving claims to a jurisdictional analysis.

The court lastly addressed whether federal question jurisdiction existed under the Administrative Procedure Act ("APA") or in the Circuit Court of Appeals under section 1369(b)(1)(F) of the CWA. The court found section 704 of the APA inapplicable because the CWA provided an adequate remedy of law in the exclusive jurisdiction of the Circuit Court of Appeals pursuant to section 1369(b)(1)(F). However, section 1369(b)(1)(F) only applied to NPDES permitting decisions later objected to by the EPA. The court stated that when the EPA remains silent, federal courts have no jurisdiction to review state permitting deci-

sions. Thus, the court granted the EPA's motion to dismiss for lack of jurisdiction on all POTW claims.

Michael Graetz

Marseilles Hydro Power, L.L.C. v. Marseilles Land and Water Co., 2004 U.S. Dist. LEXIS 9849 (N.D. Ill. May 28, 2004) (holding:(1) water right agreements should be interpreted as contracts, not as covenants running with the land; and (2) a hydroelectric power company was the proper second party to those water rights agreements).

Marseilles Land and Water Company ("MLWC") leased water power generated by the diversion of the Illinois River through canals including the North Race canal. In 1910 MLWC entered into a ninety-year water rights agreement known as an indenture ("1910 Indenture") with Eugene Chubback, who owned a power station on the North Race canal, for rights to a portion of water flowing through the canal. In 1924 a dispute arose under the 1910 Indenture between MLWC and a subsequent power station owner; the parties decided to enter into a new indenture ("1924 Indenture") in order to clarify the 1910 Indenture. In 2000 Marseilles Hydro Power, L.L.C. ("MHP"), the present owner of the power plant, sought declaratory and injunctive relief with respect to agreements on water rights under the 1910 and 1924 Indentures. MHP and MLWC both sought summary judgment on the issue of whether MHP was the proper second party to the Indentures, and if so, what MHP's rights and obligations were under the Indentures.

The United States District Court for the Northern District of Illinois first considered whether MHP was the proper second party under the 1910 Indenture. The 1910 Indenture stated that transferring ownership of the power station to a second party did not separate the 1910 Indenture from the property. Therefore, transferring ownership of the power station also transferred the rights and obligations of the 1910 Indenture to the new owner. The 1924 Indenture stated that if an owner of the power station transferred the 1910 Indenture separately from the land, MLWC could cancel the 1910 Indenture. The court held that the 1910 Indenture was not a covenant running with the land because the 1910 Indenture did not "affect the use, value, and enjoyment of the property." Since the 1910 Indenture was not a covenant running with the land, an owner could legally transfer the 1910 Indenture separately from the power station, however the transfer would still violate the 1924 Indenture.

The court found that the prior owners of the power station made transfers of the land separately from the Indentures in violation of the 1924 Indenture, which created a contractual duty not to separate the Indentures from the property. However, the court found that MLWC waived MLWC's right to cancel the Indentures by failing to terminate