UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-23427-CIV-HOEVELER

SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, and NATIONAL PARKS CONSERVATION ASSOCIATION,

Plaintiffs,

v.

ROBERT B. FLOWERS, Chief of Engineers, United States Army Corps of Engineers, and STEVE WILLIAMS, Director, United States Fish and Wildlife Service; and MIAMI-DADE LIMESTONE PRODUCTS ASSOCIATION, INC., VECELLIO & GROGAN, INC., TARMAC AMERICA LLC, FLORIDA ROCK INDUSTRIES, INC., SAWGRASS ROCK QUARRY, INC., APAC-FLORIDA, INC., and RINKER MATERIALS OF FLORIDA, INC.,

Defendants/Defendant-Intervenors,

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ORDER ON MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE comes before the Court on the parties' various motions for summary judgment.[1] This Court heard argument on October 22, 2004, and additional argument was heard on September 30, 2005. The following briefly summarizes the most salient facts of

[1]Plaintiffs' Motion for Summary Judgment, filed May 10, 2004; Defendant Flowers' and Williams' ("Federal Defendants") Motion for Summary Judgment, filed June 4, 2004; Intervenor Defendant Rinker Materials' Motion for Summary Judgment, filed June 14, 2004; and a Motion for Summary Judgment filed jointly on June 14, 2004, by six intervening defendants: Miami-Dade Limestone Products Association, Inc.; Vecellio & Grogan, Inc.; Tarmac America LLC; Florida Rock Industries, Inc.; Sawgrass Rock Quarry, Inc.; and APAC-Florida, Inc. ("Industry Defendants"). Rinker Materials joined in that motion, and the use of the term Industry Defendants will include Rinker.

this case, all of which will be addressed in greater detail below.

In 1991 the limestone mining industry approached federal, state, and local government regulators with a sixty-year plan for mining in wetlands in southeastern Florida, in an area described by the industry as the ""Lake Belt," near Everglades National Park ("ENP") and related water conservation areas in western Miami-Dade County. The mining plan included significant new areas of mining as well as continued mining in areas previously permitted, and required the destruction of tens of thousands of acres of wetlands located above the Biscayne Aquifer (the County's sole source of drinking water) in order to reach the limestone rock below. The following year, the Florida Legislature established a Lake Belt committee to develop a plan that would "enhance the water supply for Dade County and the Everglades" as well as "maximize efficient recovery of limestone while promoting the social and economic welfare of the community and protecting the environment." Fla. Stat. §373.4149. Later that same year, in anticipation of new permit applications and requests to extend previously issued permits, the United States Army Corps of Engineers ("Corps") announced its intention to prepare an Environmental Impact Statement ("EIS") for limestone mining "which could impact approximately 54,000 acres of wetlands by the year 2050 in northwest Dade County." AR65.[2]

Over the next several years a number of issues were raised for discussion and analysis by interagency groups and other committees, e.g., risks to protected species, extent of need for locally-produced limestone products, potential contamination of the Aquifer, and threats of additional inverse condemnation lawsuits (one of the mining

[2]Army Corps of Engineers' Administrative Record ("AR"), document number 65.

companies, Florida Rock, had successfully sued the United States in the mid-1980s on a claim that the denial of permits for mining in this area was an unconstitutional taking of property, recovering $21 million for 1,560 acres[3]). Analysis of these issues revealed that while the Lake Belt area contains large quantities of limestone, the mining would directly destroy wetlands, potentially contaminating millions of gallons of drinking water drawn daily from the Aquifer, and that the large deep pits which remain after mining would negatively affect groundwater seepage rates in and out of surrounding water areas, e.g., ENP; also, the remnant mining pits might compromise the larger program of Everglades restoration.

The Corps issued a final EIS in June 2000, AR614, which addressed the issuance of mining permits of fifty years each, for a total of 14,300 acres to be mined in the Lake Belt, including new and existing areas. The permit period later was reduced by the Corps to ten years, as an apparent compromise between the mining industry's urgent demands that new permits (approx. 8,400 acres) be issued concurrently with extensions of soon-to-expire existing permits (approx. 5,900 acres), and the objections to the mining plan that were being raised by federal and state agencies, local government, private organizations,

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[3]The mining industry's most active representative and advocate throughout the administrative proceedings, Paul Larsen, reminded the Corps in January 1996 that "[t]he only question remaining [in the Florida Rock takings litigation] is the value of the lands which will have to be paid by the U.S. Government. Based on this precedent, any other permit denials by the Corps in the Lake Belt Area would likely result in a determination in favor of the industry." AR257. At a meeting in July 1997 between DEP and the mining companies, land swaps (miners' land for State land) were discussed; the meeting also discussed that the land swap recommendation must include a discussion of the takings history in Pennsuco [i.e. Florida Rock litigation] wetlands and the potential for future takings litigation. AR498 (July 14, 1997).

and individuals.[4] The Corps issued a Record of Decision ("ROD") in April 2002, AR1028, collectively approving the new limestone mining permit applications and extending the term of the previously-issued permits, for a total of approximately 5,400 acres of mining to take place in ten years.[5] The new permits had an initial three year review period, after which the permits could be modified, if necessary.[6]

Plaintiffs allege that the Corps erred in issuing the ROD and awarding the permits[7]

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[4]Indeed, the Corps and others referred to these permits as "bridging permits" which would permit the Corps quickly to grant extensions of existing permits and to approve new mining in a reduced number of acres, thereby allowing mining to continue until the Corps could develop an acceptable plan for the full fifty years of mining, i.e., a plan that didn't raise the significant wetlands impact, mitigation, protected species, hydrology, and water quality questions raised by the plan then under review.

[5]In April 2001, after the permit period was reduced and the total acreage was reduced to 5,400, a senior Corps staff member explained to a senior member of United States Fish and Wildlife Service ("FWS") that some of the mining companies still had permits that were being extended but were not going to be mined in the next ten years, e.g., "Rinker's permit is 20 year permit." AR816. In February 2002, Corps staff observed that the ten year footprint would "actually ... take 16 yrs to mine." AR978. The ROD explains that the mining in this "ten year" footprint "will not be mined out for 14 years," AR1028 at 67, to allow for certain companies that may need the additional acreage to continue mining, in the event that they mine more rapidly than the industry standard rate. At a hearing before the Court on October 22, 2004, counsel for the mining industry indicated that his clients "already had the right to mine most of the area" and that there wasn't much new area in the recently issued permits (which incorporated the existing permits). Evidently, most of the 5,400 acres at issue represented permit extensions/renewals and this ROD, which purportedly approves ten years of mining, seems to authorize far more.

[6]Interestingly, the Revised Public Notice issued by the Corps on March 1, 2001 – the last notice to the public regarding the permits prior to issuance of the ROD – stated that mining "would not proceed after the review date unless the permits were specifically renewed with modifications, if needed," AR737, but the language of the ROD implies that the permits would continue to be valid after the review date, without a specific renewal, and that they only would be subject to "adjustment." AR1028 at 73.

[7]The permits are issued for "dredge and fill" activities in wetlands, pursuant to Section 404 of the Clean Water Act, as discussed in greater detail below.

to members of the limestone mining industry to conduct mining activities for ten years on 5,400 acres without, *inter alia*, updating the EIS that had been issued two years earlier. Further, they allege that the United States Fish and Wildlife Service ("FWS") failed in its duty to protect the wood stork, and other species whose habitats may be affected by the mining, by determining that the Corps' actions were "not likely to adversely affect" those species -- without FWS conducting its own full assessment of the situation. Plaintiffs have alleged violations of the Administrative Procedures Act ("APA"), 5 U.S.C. §706; the Endangered Species Act ("ESA"), 16 U.S.C. §1531 et seq.; the Clean Water Act ("CWA"), 33 U.S.C. §1251 et seq.; and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321 et seq.

The Corps and FWS ("Federal Defendants") argue that the permitting process was handled correctly, over a multiple year period, with the involvement and subsequent concurrence of all major federal, state, and local agencies, and that deference ultimately must be shown to the federal agencies. They offer as evidence of their deliberative process that they ultimately reduced the originally requested permit period from fifty years to ten years, required that the permitted activities be evaluated after the first three years, and also imposed additional conditions in response to concerns raised by objectors. The members of the limestone mining industry ("Industry Defendants"), who were permitted to intervene in this action because of their economic interests in the subject of this litigation, argue that the permits were issued legally, with sufficient analysis of environmental impacts, and that a failure to permit this mining would result in an improper restriction on private property interests.

PROCEDURAL BACKGROUND

Plaintiffs initially filed their Complaint on August 20, 2002, in the United States District Court for the District of Columbia. The Federal Defendants filed an Answer and moved to transfer the action to this district, and members of the limestone mining industry filed a request to intervene as defendants.[8] On August 4, 2003, the Federal Defendants' motion to transfer was granted, and on December 30, 2003, this case was assigned to this Court. The Court granted the pending motion to intervene, and also granted Plaintiffs' request to amend their complaint to include claims based upon new information submitted to the Corps after the permits had issued (in light of all defendants' representations that they had no objection to such amendment).[9]

The Amended Complaint, filed April 6, 2004, seeks declaratory and injunctive relief

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[8]The permits were issued to a total of ten companies, all of whom had been mining in the area subject to previously granted permits. Only nine of the permits are at issue herein, however, because one of the companies receiving a permit, the Lowell Dunn Company, did not obtain its permit until October 2004, i.e., subsequent to the date of the agency action under review herein. Six of the nine companies receiving permits are represented in this action, and another, Continental Florida Materials, Inc., is represented indirectly through its membership in Defendant Miami-Dade Limestone Products Association, Inc., an organization which includes many of the Industry Defendants (See Memorandum in Support of Motion to Intervene, Exhibit D, in Docket Entry #2). The six directly represented are Vecellio & Grogan, Inc. (also known as White Rock Quarries), Sawgrass Rock Quarry, Inc., Tarmac of America, Inc., APAC-Florida (also known as Pan-American Construction), Florida Rock Industries, Inc., and Rinker Materials of Florida, Inc. (also known as CSR Rinker Materials Corp.). The final two companies which obtained permits, Sunshine Rock, Inc., and Kendall Properties & Investments, are not parties to this action.

[9]Plaintiffs' Motion to Amend the Complaint was filed on March 25, 2004. On March 30, 2004, the Corps responded to correspondence from one of the Plaintiffs and "request[ed] that [Plaintiff] provide any additional information ... regarding the wellfield, including the various documents ... reference[d] in [Plaintiffs' submitted] report, as well as any other information you wish us to consider, so that we may address these and other pertinent concerns in a timely manner." SAR1879.

and specifically alleges the following violations by the Corps: 1) insufficient analysis in the EIS (Count V, NEPA and APA); 2) failure to prepare a supplemental EIS prior to issuance of the ROD (Count V, NEPA and APA); 3) issuance of the permits without sufficient analysis or opportunity for public participation (Count I, CWA and APA), and without completing the formal consultation process required by the ESA or otherwise protecting listed species (Count III, ESA); and 4) deficiencies in the agency's response to Plaintiffs' complaints after issuance of the permits -- Plaintiffs had urged the agency to prepare a SEIS at that time (Count VI, NEPA and APA), and to stop the permitted activity pending a reevaluation of the agency's decision (Count II, CWA and APA). Plaintiffs also claim that FWS' concurrence in the Corps' decision that no formal consultation was required and FWS' failure to re-initiate consultation violated the ESA and APA (Count IV).

Summary judgment motions were briefed by all parties, and a full day hearing was held on October 22, 2004. The Federal Defendants subsequently notified the Court, on May 2, 2005, that the anticipated completion of the initial review process, specified in the permits to be conducted three years after the permits were issued, would be delayed. An additional hearing was held on September 30, 2005, at which time the Court posed several questions to counsel regarding the status of the pending initial review and issues related to the announced delay. Shortly after that hearing, Plaintiffs filed a request to dismiss, without prejudice, Counts II and VI of their Amended Complaint.[10] As there have been no

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[10]The Federal Defendants previously had argued that this Court lacked subject matter jurisdiction over Count II and that it would be premature to address the allegations in Count VI. Plaintiffs had argued that the Corps' written response to Plaintiffs' criticism of the issuance of the permits constituted sufficient "agency action" to trigger this Court's review of the Corps' response and, thus, that these Counts might be considered. As the Court has granted Plaintiffs' motion to voluntarily dismiss Counts II

objections filed as to the question of dismissing[11] these Counts, the Court will grant that request, noting that the claims may be renewed at an appropriate time.

THE STANDARD OF REVIEW

Clarifying the Claims and Record to Be Reviewed

The Federal Defendants argue that there is no cognizable claim under the ESA against FWS for failing to engage in formal consultation (Count IV) -- but rather that such claims are to be reviewed under the APA -- a point which Plaintiffs concede. The Federal Defendants also argue that this Court lacks subject matter jurisdiction due to an alleged procedural defect regarding Plaintiffs' claim that the Corps failed to complete the formal ESA consultation process (Count III). The Court has examined the question of whether the Corps had sufficient notice of Plaintiffs' intent to sue, and has determined that since Plaintiffs' March 30, 2001, letter, AR793B, specifically incorporated their September 25, 2000, notice of intent to sue, and because it is clear from the record that the Corps had information from Plaintiffs as to their claims, that it thus would not be error for this Court to address the substance of the allegations now presented by Plaintiffs. As noted above, the Court has dismissed Counts II and VI. Therefore, in summary, the claims appropriate for review are those in Count I (Corps' issuance of the permits/ROD in compliance with CWA and APA), Count III (Corps' compliance with ESA), Count IV (FWS' compliance with

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and VI, these arguments will not be addressed at this time.

[11]The objections raised by the Federal Defendants and Industry Defendants primarily relate to whether Plaintiffs would be entitled to attorneys' fees at some point for these dismissed claims. This is an issue that need not be resolved at this time.

APA), and Count V (Corps' preparation of EIS, and failure to issue SEIS pre-ROD, in compliance with NEPA and APA).

Generally, judicial review of an agency action is limited to review of the record available to the agency at the time of the final action which forms the basis of the complaint. There are only a limited number of situations which permit a reviewing court to review extra-record materials -- one of which is when an EIS is challenged, because such a challenge raises questions as to the sufficiency of the analysis contained therein.

> Although the focus of judicial inquiry in the ordinary suit challenging nonadjudicatory, nonrulemaking agency action is whether, *given the information available to the decision-maker at the time*, his decision was arbitrary or capricious, and for this purpose 'the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court,' in NEPA cases, by contrast, a primary function of the court is to insure that the information available to the decision-maker includes an adequate discussion of environmental effects and alternatives, which can sometimes be determined only by looking outside the administrative record to see what the agency may have ignored.

Suffolk County v. Secretary of Interior, 562 F.2d 1368, 1384 (2d Cir. 1977) (district court did not err in accepting extra-record evidence and testimony, but clearly erred in concluding that such evidence and the record revealed NEPA violations in preparation of EIS for proposed leasing of offshore oil and gas resources) (citations omitted, italics in original), quoting Camp v. Pitts, 411 U.S. 138, 142 (1973).

The parties have submitted the Administrative Record of the Corps ("AR"), including its supplement, on a total of seventeen compact disks, with an index alone that is more than 100 pages in length. The record consists of thousands of pages of reports, correspondence, maps, studies, tables, handwritten notes, and electronic mail messages, spanning the time period of 1980 - 2004. In addition, the Administrative Record of the

FWS ("FAR") consists of eight large binders, and includes additional materials on computer disk. The decision documents themselves total more than 1,000 pages, e.g., the EIS is 992 pages, including appendices. Subsequent to the amendment of the complaint, the Federal Defendants submitted a certified Supplement to Administrative Record ("SAR"), containing an additional approximately 150 documents dated as recently as April 27, 2004, and beginning as early as July 24, 2000.[12]

The parties have attempted to introduce materials that simply did not exist prior to the date of the ROD. For example, Plaintiffs offered the report of Dr. Stavros Papadopulos as to potential contamination of the Aquifer by mining activities, and his report was referenced in Plaintiffs' correspondence to the Corps dated February 16, 2004. SAR1317. According to Plaintiffs, Dr. Papadopulos conducted a tracer dye study in April 2003 which suggests that cryptosporidium and giardia, microorganisms which negatively affect drinking water safety, can travel faster/survive longer in water than previously thought.[13] See Am. Compl., Attachment 1. This information clearly is material to a comprehensive analysis of environmental impacts from mining; however, because this report was completed after

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[12]As noted above, when complaints are raised about an agency action, the Court generally reviews only the administrative record and only for the period of time leading up to the challenged action. In this case, however, it appears that the Federal Defendants are offering an administrative record for review that goes well beyond the date of the issuance of the ROD, i.e., the action which is the primary focus of the Plaintiffs' allegations. Presumably, this was done in an abundance of caution in light of the multiple allegations in the Amended Complaint, and also to include documents which had been identified as missing from the original record, see AR1336.

[13]For example, the organisms could reach the restricted area around the Aquifer's wellfield pumping locations from as far away as five miles instead of the one-half mile setback figure that the Corps previously had applied. See Am. Compl., Attachment 1.

the date of the ROD, the Court only cursorily reviewed the information contained therein to determine whether the substance of the report suggested that the EIS failed to analyze adequately the contamination risks.[14] The recent submissions by the Industry Defendants present a source of material that not only was not in existence prior to the ROD, but also was not any part of the administrative record (not even the supplemental record). For example, excerpts from the Lake Belt 2004 Annual Report, dated January 2005, are offered to demonstrate that the mining industry recently has been conducting water quality monitoring studies. See Docket Entry #59, Exhibit A, Attachment 1.[15] The Court appreciates the efforts by the parties to amplify the record evidence, but despite this intriguing information accumulated by the parties after the issuance of the ROD, the Court has made its determination on the issues based upon the record – unless otherwise expressly noted – with each alleged agency action reviewed in light of the appropriate agency's record through the date of that specific action.

The Relevant Statutes, Rules, and Regulations

The standard for granting summary judgment is so often applied that it is rarely

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[14]The Industry Defendants promptly provided their own analysis of the Plaintiffs' information. According to a memorandum dated March 15, 2004, from MacVicar, Federico & Lamb, Inc., there were "significant problems with the modeling approach and assumptions [of Dr. Papadopulos]" and the mining industry maintained its position that "permitted mining activities do not pose an imminent threat to the wellfield or public health." SAR1327 at 1818.

[15]Although the Court has not relied on these recent materials (submitted by the Industry Defendants) for its analysis of the issues presented herein, it is possible that the inclusion of these materials in the Court's record may be of some assistance during appellate review, if such is required. The Court therefore denies the Plaintiffs' Motion to Strike these materials.

examined; a brief study is instructive here, particularly in light of the constraints on judicial review of agency actions such as those challenged herein. The burden on the moving party is a high one: the weight of all the evidence, considered in a light most favorable to the non-moving party, must demonstrate the lack of a genuine, triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Under this strict standard, summary judgment is appropriate only if the record evidence shows that the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. When the Court is reviewing an administrative agency's decision, the summary judgment standard must be applied consistently with the mandate that great deference be given to agency actions.[16]

Plaintiffs have alleged violations of the APA and several environmental laws: NEPA, CWA, and ESA. The APA permits a court to set aside an agency's actions, findings or conclusions only where they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. §706(2)(A), or "without observance of procedure required by law," 5 U.S.C. §706(2)(D). Courts have adopted the APA standard of review, specifically the "arbitrary or capricious"[17] test, as to each of the environmental

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[16]To reconcile the principle of agency deference with the charge of taking all the evidence in the light most favorable to the non-moving party is particularly difficult as to the summary judgment motion filed by the Federal Defendants. Indeed, this Court has studied the arguments in that particular motion with exceeding care in order to abide by the directive that the Court consider all the evidence in a light most favorable to the non-moving party, i.e., Plaintiffs, without doing violence to the principle of agency deference, i.e., deferring to the moving party -- the Federal Defendants.

[17]Some courts describe the test as whether the agency action was "arbitrary and capricious," while others describe the test as "arbitrary or capricious." Although the distinction may be of little significance, this Court has applied the test as stated in the APA, i.e., was the agency action "arbitrary" or "capricious" (or "an abuse of discretion" or "otherwise not in accordance with law"). 5 U.S.C. §706(2)(D).

statutes at issue herein. See, e.g., Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 375 (1989) (rejecting "reasonableness" standard of review in favor of APA's "arbitrary or capricious" standard as to NEPA claims); Preserve Endangered Areas of Cobb's History, Inc. v. U. S. Army Corps of Engineers, 87 F.3d 1242, 1249 (11th Cir. 1996) (applying "arbitrary or capricious" standard to CWA claim); Fund for Animals, Inc. v. Rice, 85 F. 3d 535, 547 (11th Cir. 1996) (narrow "arbitrary or capricious" standard applicable to ESA claims).

"The court shall not substitute its judgment for that of the agency." Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers, 87 F. 3d 1242, 1246 (11th Cir. 1996), citing Citizens to Preserve Overton Park, Inc., v. Volpe, 401 U.S. 402, 416 (1971). The principal purpose of the deferential review is "to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements about which courts lack both expertise and information to resolve." Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 66 (2004) (court can only compel agency to act when the agency had an enforceable duty to do so).

This deferential standard of review does not in any way suggest a "rubber-stamping" role for the judiciary; rather, the Court must "immerse" itself in the evidence in order to determine whether the agency decision was rational and based on consideration of the appropriate factors.[18] See, e.g., Ethyl Corp. v. Environmental Protection Agency, 541 F.2d

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[18]While the evidentiary burden on the movant is great, the opposing party has a duty to present affirmative evidence, i.e., to identify supporting evidence in this administrative record, in order to defeat a properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Evidence that is

1 (D.C. Cir. 1976) (en banc) (EPA had rational basis for promulgating regulations to reduce lead content of gasoline because lead emissions presented significant risk of harm).

> The close scrutiny of the evidence is intended to educate the court. It must understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made. The more technical the case, the more intensive must be the court's effort to understand the evidence .... The enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a superagency that can supplant the agency's expert decision maker. To the contrary, the court must give due deference to the agency's ability to rely on its own developed expertise.

Id. at 36. Importantly, deference to an agency's decision is not required if the agency has failed to follow its own regulations. "The failure of an agency to comply with its own regulations constitutes arbitrary and capricious conduct." Simmons v. Block, 782 F.2d 1545, 1550 (11th Cir. 1986) (citation omitted) (agency did not follow its own regulations in accepting cash bid that was lower than credit bid offered pursuant to sale of surplus property); see also, Sierra Club v. Martin, 168 F.3d 1 (11th Cir. 1999) (agency decision not entitled to deference since decision violated National Forest Management Act and its implementing regulations by not gathering species data prior to approving timber sale).

The narrow scope of this Court's review does not place blinders on the Court nor does it reign in the Court's authority once it has determined that an agency has violated its own regulations. Indeed, the deferential judicial review of an agency's actions should oblige that agency to disclose fully the reasoning behind its decisions in order to demonstrate clearly that such decisions were issued in compliance with governing laws -- such candor would ensure that our nation's environmental laws are respected.

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merely colorable or not significantly probative is not sufficient. Id.

ANALYSIS

I. INTRODUCTION

Although the permits at issue are described as being for 5,400 acres of mining over a ten year period, according to Plaintiffs, the Corps' permitting decision was simply "the first phase of a much larger plan to transform more than 15,000 acres of Everglades wetlands to mining pits over the next several decades." Am. Compl, at 2. Plaintiffs argue that the Corps' reliance on reports prepared by or paid for by the permit applicants, i.e., the mining companies, improperly influenced the environmental analysis required by NEPA, the CWA, and the ESA – particularly as to the consideration of whether there were other available and environmentally preferable sources of limestone. Plaintiffs claim that the Corps violated NEPA by failing to fully consider the "no mining" or "curtail future mining" alternatives to approving the mining plan, and that the permits should not have issued because the permit applicants failed to demonstrate, as required by the CWA, that there were no practicable alternatives to permitting mining in the Lake Belt. According to Plaintiffs, the Corps' EIS failed to analyze all direct, indirect and cumulative impacts resulting from the mining -- particularly as to groundwater seepage, contamination of drinking water pumped from the Aquifer through wellheads in the Lake Belt, the destruction of endangered wood stork habitat, and increased urbanization -- and that the ROD failed to provide an adequate discussion of what mitigation would be required for the inevitable adverse effects of the mining, e.g. the conversion of thousands of acres of wetlands into mined-out deep quarry pits.

Plaintiffs also attack the ROD, which included the Corps' conclusion that the permit

action would "not have a significant impact on the quality of the human environment," for failing to adequately explain why mining was being approved despite the strong objections that had been raised by several governmental agencies and others. Plaintiffs argue that the Corps' failure to hold a public hearing or to encourage public participation in the permitting process violated the CWA and NEPA; for example, Plaintiffs note that the public never received notice of the permits' ten "special conditions" until the permits were issued, even though those "special conditions" revealed compromises as to the transfer of mined property to the public and other issues that had been the subject of substantial criticism.

In addition, Plaintiffs claim that the Corps and FWS erred by deciding not to enter into formal consultation under the ESA regarding the potential impact on the wood stork population, and by failing to re-initiate consultation after the receipt of additional information on the wood stork's habitat, as well as by not taking required steps to protect other species.

The Federal Defendants assert that the long agency review process was handled correctly and that Plaintiffs have not provided evidence that demonstrates that the reports provided by the mining industry were biased or that contradicts the industry's reports. Mining has been ongoing in the Lake Belt area for decades, according to the Federal Defendants, and the Corps was required to consider the "economic hardship on the mining industry" and the "legal issues" that would arise if the permits were not issued. Reply Brief, Docket Entry #42, at 4. According to the Federal Defendants, the EIS provided a comprehensive environmental analysis, and the ROD provided a sufficiently detailed mitigation plan; they also argue that the subsequent decision to reduce the amount of acres and the length of time for mining under the permits satisfactorily addressed the concerns that had been raised by objectors. The Federal Defendants also claim that the

evidence regarding the wood stork population in the area does not establish that its habitat will be negatively affected, nor were any other species going to be harmed by the mining. As the Corps had received extensive written comments throughout the deliberative process, the Federal Defendants claim that a public hearing was not necessary; they also argue that a number of public workshops and meetings were taking place regarding the Lake Belt, and that they did not have to do anything further to encourage public participation.

At the hearing in September 2005, the Court heard argument from the parties as to whether it would be prudent to stay consideration of the undeniably ripe issues until completion of the initial, i.e., three-year, review of the permits.[19] No consensus emerged, and the Court determined that it would be improper to delay decision on these issues – particularly if such delay were to be perceived as an attempt by the Court to provoke a particular agency action. This Court's responsibility is simply to determine whether the Federal Defendants fulfilled their duties and not to determine whether a remand is "practical" in light of subsequent developments.[20]

The Court has studied this case very carefully, and is disturbed by the fact that so

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[19]The attractiveness of that approach was that in the event that the Corps ultimately determined that the permits should be revoked, i.e., that the mining must cease at the conclusion of the initial review, then a remand of this matter -- which the Court had begun to determine would be necessary based upon the existing record -- might not have been necessary.

[20]The presence of the recent materials in the court record certainly tempts the Court to review them in order to determine whether (or how) any of the troubling issues have been addressed, but such review would be improper and, in any event, probably would not obviate the remand which the Court reluctantly has concluded is required in this case. This Court will, of course, entertain appropriate motions from the parties if circumstances develop which require modification of this order.

many strong objections to the issuance of these permits had been raised by other governmental agencies, as well as by individuals, and that the administrative record reveals an urgency and pre-determination about the decision-making process that may have resulted in a less than full consideration of important issues. Most importantly, such a rushed approach[21] to the agencies' specifically charged duties is contrary to the dictates of the federal environmental laws, both procedurally and substantively, and leaves this Court with the inescapable conclusion that the decision-making process suffered from substantial deficiencies which resulted in agency decisions that were not in accordance with these laws.

At both the first and the supplemental hearing on the summary judgment motions, the Court heard extensive argument from learned counsel for all parties. Also, in addition to reviewing the decision documents and the parties' briefs thoroughly, the administrative records of both the Corps' and the Fish and Wildlife Service have been studied in great detail. The Court's review has disclosed several areas of critical concern in the manner in which the agencies proceeded with respect to these permits. These areas are outlined below, and then addressed in more detail later in this opinion.

First, there is an underlying theme of pre-determination evident in the frequent

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[21]The casual observer might question the Court's characterization of the process presently under review as "rushed" -- particularly in light of the decade that passed between the Corps' 1992 announcement related to the industry's requests and the ultimate decision to issue the permits in 2002. Indeed, at the commencement of the Court's review it seemed that such a lengthy process certainly would compel the conclusion that the review was comprehensive enough to satisfy the environmental laws; it was only upon a deeper examination of the record that the Court discovered that many significant issues fell prey to a "rushed" and inadequate analysis, despite the number of years that passed.

reference by the Corps' staff to the historical presence of mining in the area, the Corps' swift rejection of suggestions that mining be stopped or limited, and the omnipresence of mining representatives and their reminders that the Florida legislature's creation of a Lake Belt Committee indicated the state's support for mining; additionally, the record reveals that Corps staff were fully aware that one of the permit applicants, Florida Rock, already had filed a successful regulatory takings challenge against the Corps in the early 1980s which resulted in a significant settlement in 2001, after the EIS was published.[22] (The ROD describes the case and settlement. AR1028 at 37.) To the extent that this sense of inevitability permeated the agencies' decision-making processes, there is a high likelihood that procedural safeguards, such as those enshrined in NEPA and the CWA, were overlooked or viewed as unimportant in light of the expected approval of the mining. The Court also is concerned about the perception, suggested by comments of Corps staff, that the Corps was "negotiating" with the miners, rather than serving as the regulatory agency[23]

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[22]A year before the settlement was reached, a senior Corps staff member wrote to DEP staff and others, observing that "[t]he feds have tried to settle with Florida Rock. I think that has hurt these [permitting] efforts." AR710. In November 1996, an attorney for the Corps had asked for advice from the Department of Justice as to whether a settlement with Florida Rock was "worth the price" and questioned "how much money ... would flow out of the federal treasury to settle the takings litigation." AR337.

[23]The Court questions what role the threat of additional takings litigation played in the permitting decision, and whether the decision to issue the permits would have been different if sufficient funds (in the budget of a land-acquiring agency) existed to acquire the lands owned by the miners rather than grant the permits. The Corps' regulatory program "does not have the authority under Section 404 of the Clean Water Act to undertake land acquisition .... and [t]he costs of the miner's land alone [41.5 square miles] will probably exceed $1 billion ...." AR637. "The Corps is not a land management agency and does not have the necessary congressional authorization or funding to acquire conservation lands." AR1028 at 37.

charged with enforcement of this country's environmental laws.[24] The Court is mindful of the challenges faced by the agencies, many of whose employees clearly labored long hours to attempt to protect our natural resources while meeting the demands of this well-organized industry, but the Court cannot ignore the obvious: the Corps did not exercise the full range of its authority, but rather allowed negotiations with miners to result in procedural shortcuts and other abuses of the discretion that has been entrusted to the agency.[25]

Second, the urgency of the Corps' actions, which is detectable at different points in the record, may have resulted in decisions that were arbitrary or capricious. For example, this urgency may have compromised the ability of objectors, including agency staff and members of the public, to fully voice their concerns – thus restraining the mandatory

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[24]For example, in early 1997, a Corps staff member noted in a message to FWS staff that the mining consortium was "pretty fragile" and that "[r]ight now there are lots of unhappy folks ... so if we could report some progress towards a consolidated federal position, I think that would help extinguish some of the flames" -- apparently suggesting that FWS should agree to the 2.5:1 mitigation ratio (i.e., 2.5 acres of restored wetlands for each 1 acre destroyed) that had been generally accepted by other agencies but which was lower than FWS had requested. AR464. One year later, when the mining industry walked out of an interagency meeting because, upset that negotiations weren't going their way, Corps representatives still pursued the industry to "see if they want to continue working on this." AR560, AR558. In July 2001, Corps staff noted concerns that the coalition formed by the mining industry (to seek a collective permit) might "collapse [and our workload will surely increase]." AR843. Finally, in March 2002, senior Corps staff agreed to modify mitigation calculations "to see if this takes care of the miners concern [since the miners were unhappy with the Corps' method of updating mitigation requirements on the permits to be renewed]." AR1009.

[25]It is abundantly clear from the record that this process involved many experienced and very well-intentioned public servants, striving to find an acceptable and correct solution to a complex problem in the face of consistent pressure from the permit applicants and their representatives, as well as a deadline imposed by the Florida Legislature. Advocates for protecting the environment by minimizing mining also participated in the process, although to a significantly lesser extent than the mining industry – and each referred to the other as "special interests." AR914, AR549/FAR123.

agency coordination and public participation that are vital elements of the federal environmental laws. The most clear evidence of the timing pressures faced by the Corps is disclosed in the EIS, which reported that if the Corps did not issue permits for mining before September 30, 2000, "then the mitigation fee [$.05 per ton of rock mined in the Lake Belt] will be suspended until re-adopted by the Florida Legislature." AR614 at 100. The Corps' earlier attempts to reach agreement with the miners on a higher mitigation fee (of $.08 per ton, AR560) had been unsuccessful, so the effect of this state legislation may have been to push the Corps to grant the mining permits, and to do so promptly, rather than risk the ability to collect substantial funds from the mining industry to pay for the required mitigation. This area of concern was expressed in communications between the agencies assembling the mining and mitigation plans and may have caused the FWS and EPA to decide not to pursue their objections further, even though their areas of concern apparently remained unresolved, e.g. potential groundwater contamination, adequacy of mitigation plan, etc. It is unclear whether each of the agencies' objections actually had been addressed fully, or whether there was a concerted effort to reach agreement in order to keep the process moving toward granting the permits with a mitigation fee in place, or whether – as Plaintiffs suggest – the objections were not pursued further because of fear of reprisals within and between agencies.[26] Finally, the Corps' failure to take the time to hold a public hearing and its lack of meaningful engagement with the general public, i.e.,

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[26]While Plaintiffs argue that this change in the position of FWS and EPA (in 2001 and 2002, respectively) is more than coincidental to a national change in political administrations, there is no record evidence to support that assertion and this Court is unwilling to draw such a conclusion upon the present record, particularly in light of the timing of the agencies' earlier objections – some of which were strenuously raised by EPA and FWS after the change in administrations took place in early 2001.

not just the permit applicants or select environmental advocacy groups, stand as further evidence of the regrettable effects of rushing through such important environmental decisions. The examples above highlight the circumstances that lead to the ultimate and unfortunate result: certain of the agencies' decisions lacked a rational basis and were not supported by the record before the agency at the time.

Third, the rush to finalize the permitting decision also may have compromised the analysis and scientific review that is vital to this type of endeavor, particularly as to the determination of an environmental baseline against which to measure impacts regarding groundwater seepage, and also as to the study of potential contamination of the Aquifer. One interagency group's report makes several references to the compressed time schedule in which it was required to perform its analysis as to alternative scenarios for the mining, noting that very little empirical data was able to be accessed and analyzed.[27] The Corps' rush to issue the EIS (in order to be able to meet the September 30, 2000, permit deadline imposed by the Florida Legislature) may explain the notable absence of updated relevant scientific analyses. For example, of the 38 scientific references cited in the EIS, nearly half (sixteen) were at least twenty years old by the time that the EIS was issued, and only one had been published within the past five years. AR614 at 106.[28] Also, the Federal

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[27]"Data pertaining to hydrology, water quality, and engineering models, while considered valuable, were impossible to develop given the [short] three month schedule." AR614 at 841.

[28]The reports contained in the Appendices of the EIS (issued in June 2000) were of more recent vintage, although they did not necessarily rely on more recent data. For example, Appendix A, "Hydrologic Analysis of Limestone Mining South of Tamiami Trail Between Krome Avenue and the L-31N Canal," submitted to the Lake Belt Advisory Team to the South Florida Ecosystem Restoration Working Group, April 24, 1997, on behalf of Kendall Properties and Investments, by private consultants MacVicar,

Defendants admit that they did not engage in formal consultation according to the ESA as to any species, despite the confirmed presence of the endangered wood stork in the Lake Belt. Most importantly, Miami-Dade County, through its Department of Environmental Resources Management (DERM), raised strong objections to the mining and began the process of reviewing its wellfield protections (which prohibit mining within a certain distance from the wellheads in the Lake Belt area), and updating its wellfield protection ordinance, Chapter 24-12.1, Code of Miami-Dade County, to ensure that the setbacks were sufficient to accommodate the increased risks presented by the additional mining, AR1028 at 54, but the permits were issued before the County completed its study, and without the Corps conducting its own study.[29] The County's request for a public hearing, submitted in July 2000, AR654, was not even responded to until it was denied by the Corps in April 2002, AR1023. This failure by the Corps to adequately consider relevant factors mandates a remand to the agency for further deliberations.

Perhaps most significantly, the record does not reveal sufficient support for the Corps' decision that there were no practicable alternatives to mining, nor have the briefs

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Federico & Lamb, Inc. The report was updated in February 1998, see AR614 at 244, and was based upon an October 1997 Lake Belt Model developed by SFWMD (which used June 1 to Nov. 30, 1969, for "wet condition" and Jan. 1 to May 31, 1989 as "dry condition").

[29]It may be that the preliminary tests conducted as part of the initial review indicate no negative impact as of yet, as has been suggested by the recently submitted Memorandum for Record, see Federal Defendants' Notice of Filing, dated September 27, 2005, but this Court must find in the administrative record sufficient guarantees that the agency examined the long-term impacts of mining on top of the Aquifer, regardless of any subsequent short-term testing results. To require anything less would indicate that this Court had ignored the public interest protected by the CWA or had allowed the Corps to do so.

submitted by the parties satisfied the Court's concern on this point. The regulations implementing the CWA, found at 40 C.F.R. 230.10, prohibit the issuance of a dredge and fill (into wetlands) permit if, *inter alia*, practicable alternatives exist. An alternative is "practicable" if it is "available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes." 40 C.F.R. 230.10(a)(2). There is a rebuttable presumption that practicable and environmentally preferable alternatives exist if the activity being proposed "does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not 'water dependent')." 40 C.F.R. 230.10(a)(3). In this case the Corps admittedly failed to make the presumption that a practicable and environmentally preferable alternative existed.[30] The Corps disregarded this regulatorily mandated presumption because it determined that the proposed mining was water-dependent since the applicants had requested to mine in these specific wetlands; but this circuitous reasoning is improper. If the Corps had made the proper presumption, the miners would have been required to overcome the presumption by proving convincingly either that there were no practicable alternatives or that other alternatives, e.g., mining in other locations in South Florida, northern Florida, Alabama, etc., would have a more adverse impact on the environment. The Court has reviewed in detail the 1999 report of Paul Larsen, which was submitted on behalf of the mining industry, and upon which the Corps based its entire analysis of

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[30]"In this case, the proposed activity is the extraction of particular mineral resources located in particular wetlands. It would be meaningless to state that this activity could be carried out elsewhere. Thus, the Corps properly did not apply a presumption that practicable alternatives were available." Federal Defendants' Reply, Docket Entry #42, at 16.

practicable alternatives.[31] After reviewing that report, the Court does not find record evidence to overcome the presumption that should have been applied by the Corps.[32] That is, my reading of the 1999 report and the Corps' discussion thereof, is that there appear to be practicable alternatives to mining in the Lake Belt; thus, if the Corps had not failed to apply the presumption that is mandated in the CWA regulations, such alternatives would have been investigated more rigorously and, perhaps, determined to be practicable and environmentally preferable.

While the Corps refers to its duties under the environmental laws throughout the decision documents, it also has stated that it must "weigh the rights the property owners have to use their property, the public need for material to construct houses, roads, schools, and other infrastructure, and potential ecological and economic impacts of [relocating mining to other locations]." AR637. Shifting the focus to the situation it inherited, and apparently attempting to argue that prior land use approvals for mining in or near the Lake Belt area left the Corps with little choice but to approve continued mining, the Corps notes that "[d]ecisions by the State of Florida, by Miami-Dade County and by other agencies contributed to the original decision by the landowners to locate their mining in this area." Id. The record, taken as a whole, reveals that the weight given by the Corps to the above

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[31]See "Analysis of the 'Practicability' of Non-Lake Belt Alternative Sources to Supply Florida's Demand for Basic Construction Materials." AR583 (also included with EIS as Appendix I, AR614 at 923).

[32]It bears mention that the information in this report should have been tested independently and rigorously by the Corps, since it was commissioned by an interested party in the permitting process. Indeed, the report's author, Mr. Larsen, was hired by a party whose interests would have been in direct (financial) conflict with a recommendation that mining be relocated from the Lake Belt.

concerns was such that it overwhelmed the significant environmental factors, regarding the adverse impact of the mining in the Lake Belt, that should have been given greater weight.

To summarize, my specific concerns regarding the Corps' determination that the mining required siting in these wetlands, and the agency's consequent failure to presume that a practicable (and environmentally preferable) alternative existed, compel my conclusion that this case must be remanded to the agency for further analysis. The other issues identified above, e.g., the failure to conduct formal consultation under the ESA, the lack of disclosure of important information to the public, the rush to grant the permits before the County completed its wellfield protection studies, etc., offer additional support for the Court's conclusion, as will be explained in more detail below. The Court has provided this rather lengthy introduction to assist the parties, and now turns to an expanded analysis of the points summarized above.

II. THE FACTS[33]

Southeastern Florida's miles of densely populated oceanfront are matched in significance by thousands of acres of wetlands lying several miles to the west of the coastal urban areas. The wetlands are part of the Everglades ecosystem, stretching south from Lake Okeechobee to the Florida Keys, which has received international attention not

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[33]This is a summary of facts found in the administrative record and which essentially are undisputed. The Court has taken notice of items of factual interest in opinions by other courts (particularly the takings decision reported at Florida Rock Industries, Inc. v. U.S., 791 F.2d 893 (Fed. Cir. 1986), which was included in the Corps' administrative record, AR9), and has referenced selected outside sources but only to the extent that such information provides a general context for the review of the administrative record presently before the Court.

only because of its ecological uniqueness, but also because of an unprecedented multi-billion dollar restoration program initiated in the past several years.[34] Restoration of the ecosystem is required because of the harmful effects resulting from decades of development in the area,[35] spurred in part by the Corps' own Central and Southern Florida (C&SF) Project, which provided, among other benefits, flood control for the coastal areas, thus allowing for their extensive urban development.[36] The C&SF Project Comprehensive

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[34]The federal government has declared "strong support" for the 30-year, multi-billion dollar Comprehensive Everglades Restoration Plan (CERP), described as "the most comprehensive and ambitious ecosystem restoration project ever undertaken in the United States." White House Press Release, January 9, 2002, available at: http://www.whitehouse.gov/news/releases/2002/01/20020109-3.html. The estimated cost of the first phase of CERP is $7.8 billion. AR1152 ("Final Integrated Feasibility Report and Programmatic Environmental Impact Statement, Central and Southern Florida Project Comprehensive Review Study, April 1999, page vii).

[35]For example, multiple species have been negatively affected because of changes in the natural water patterns and the loss of almost half of the historic Everglades. "Animals living in the Everglades would 'read' the water patterns, and 'know' where to go to find the food and water that they needed for successful reproduction and survival under a range of natural conditions. It was the combination of connectivity and space that created the range of habitats needed for the diversity of plants and animals.... Wading birds, perhaps more than any other animal, assess the quality of habitats over the entire basin of south Florida wetlands, before making 'decisions' about where and when, or even whether, to nest." AR1152, page iii, xi-xii.

[36]"The C&SF Project, which was first authorized by Congress in 1948, is a multi-purpose project that provides flood control; water supply for municipal, industrial, and agricultural uses; prevention of saltwater intrusion; water supply for Everglades National Park; and protection of fish and wildlife resources throughout the study area. The primary system includes about 1,000 miles each of levees and canals, 150 water control structures, and 16 major pump stations." AR1152 at page 1-10. Historically, water flowed generally to the southwest and contributed to surface and groundwater flows in the Everglades. After the C&SF project, flood control and water delivery were reconfigured to serve the urban needs of South Florida, and excess rainfall that used to flow west now flows east toward the ocean. The levees, canals, and water control structures "fundamentally altered the hydrology of the Everglades, changing the natural sheet flow of ground and surface water." South Florida Water Management Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 100 (2004).

Review Study ("Restudy"), authorized by Congress in the 1992 Water Resources Development Act (WRDA) with specific guidance provided in Section 528 of the 1996 WRDA, AR1152, examined the entire ecosystem and lead to the creation of the Comprehensive Everglades Restoration Program (CERP). The CERP study area, encompassing 18,000 square miles, includes 66,400 acres of marshes, reservoirs and recharge areas in Palm Beach, Broward, and Dade Counties, described as the East Coast Buffer, along with Water Conservation Areas (WCAs) to the west, i.e., constructed marshes designed to hold surface water for multiple purposes, including flood control, groundwater recharge, and fish and wildlife enhancement.[37] The CERP is designed to provide an environmental buffer to the Everglades, seepage reduction for the water conservation areas, water supply benefits through groundwater recharge, and the enhancement of thousands of acres of wetlands that once comprised the Everglades. AR618 at 226. Presumably this program will lead to greater health for the multiple species which utilize these wetlands, including the endangered wood stork and threatened American alligator, both of which have been observed in the Lake Belt area. AR614 at 40-50, 672, 688-96. It should be noted that the CERP is only a study or policy document and does not itself authorize any projects, but rather recommends projects. Federal Defendants' Reply brief, Docket Entry # 42, at 9.

All of these restoration efforts are particularly important to the health of the Biscayne

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[37]The WCAs consist of surface water management impoundments, covering 1,372 square miles, with a combined water storage capacity of 1.8 million acre-feet, acting as long hydroperiod sawgrass marshes which store and convey freshwater for groundwater recharge and reduction of hurricane-induced wind tides, in addition to those uses mentioned above. AR618 at 388.

Aquifer, an underground freshwater reservoir lying beneath most of Miami-Dade County and the primary source of drinking water for South Florida. AR1028 at 4. In October 1979 EPA officially designated the Biscayne Aquifer to be 'the sole or principal source of drinking water for all municipal water systems [in southeast Florida]." AR1176. The Aquifer, made of limestone-bearing materials such as shells, coral, and sand, begins beneath the wetland soils and extends to a depth of approximately 100 feet. AR614 at 27, AR1028 at 5. Miami-Dade County has taken steps to study and protect the quality of this important freshwater source,[38] and operates several public wells in an area known as the Northwest Wellfield, which is described as "the largest drinking water wellfield in the State." AR617 at 5.[39] The fifteen wells located in the Northwest Wellfield collectively draw water up from the Aquifer to supply 40% of the County's drinking water.[40] AR617 at 5, AR1028 at 5. One of the County's most important concerns is that the Aquifer not be subject to reclassification as "groundwater under direct influence" of surface water – as such a reclassification (from the

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[38]In 1985 the Dade Wellfield Protection Study Group, established by the Dade County Commission, produced a report on the topic, and designated protection zones around the wellfields. The County issued a report on August 16, 2000, as part of its ongoing efforts to verify whether the existing setbacks restricting mining from areas near the wellfield were enough to avoid risks of contamination. AR1175.

[39]Another County wellfield, the West Wellfield, is located immediately east of the mining occurring south of Tamiami Trail. AR1028 at 53. The Court has addressed the wellfield contamination risks only as to the Northwest Wellfield, but this does not indicate that mining poses no risks to the West Wellfield.

[40]"The Northwest Wellfield is a major uncontaminated source of municipal drinking water for Miami-Dade County, Florida. The wellfield consists of fifteen wells that supply a current demand of 150 million gallons per day (MGD) and a planned future capacity of 225 MGD.... The South Florida Rockmining Coalition is proposing to mine 8,400 additional acres, totaling almost 20,000 acres eventually mined out in the Lake Belt area. This would leave most of the Northwest Wellfield occupied by open water." AR1175 (technical report prepared by DERM, August 16, 2000).

present classification as "groundwater")[41] would require a costly modification of the County's regional water treatment facilities. AR1175.[42] Such modifications would be required in order to control the spread of disease-causing bacteria and other pathogens.[43]

The "Lake Belt"[44] area includes 57,515 acres, or 90 square miles, AR1028 at 4, of "ecologically pristine, degraded, and developed areas" of wetlands, AR614 at 382, which form the northwestern edge of Miami-Dade County and border the eastern edge of Everglades National Park (ENP) and Water Conservation Area 3B (WCA3B).[45] See map,

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[41]"The surface water treatment rule promulgated in 1989 by EPA requires that public water supplies derived from 'groundwater under the direct influence of surface water' (GWUDI) receive the same treatment as water supplies derived directly from surface water." AR1175 (technical report prepared by DERM, August 16, 2000).

[42]Upgrading the water treatment plants to treat for disease-causing organisms would cost approximately $250,000,000. AR654.

[43]"[M]icroorganisms that during their life cycle form spores, cysts, or oocysts ... can survive for long periods in the environment and can be very resistant to conventional treatment practices at drinking water facilities. Giardia, Cryptosporidium, and relatives such as Cyclospora and Microsporidium can survive for months in some water environments. Cryptosporidium can survive greater than six months in some water environments and is also resistant to conventional chlorination. Additionally, there are other pathogens emerging as a concern to municipal drinking water supplies. One such pathogen is a bacteria, Mycobacterium avium, which is also chlorine resistant and, unlike Giardia and Cryptosporidium which need a host to reproduce, regrows in the environment." AR1175 at p.37 (DERM technical report, cites omitted).

[44]The Sierra Club (one of the Plaintiffs herein) objected "to the euphemism of a so-called 'Lake Belt Plan'" and complained about the use of the attractive term "[w]hen what is actually being evaluated is an immense system of quarry pits that cause considerable adverse ecological effects and provide minimal, if any, ecological values." FAR80. To be consistent with the administrative record, the Court has used the term "Lake Belt" throughout this order, but expresses no opinion as to whether the term accurately describes the oddly linear and deep water-filled pits, visible in photographs in the record, that remain after the wetlands are destroyed by mining.

[45]"The area is generally bounded by Krome Avenue to the west, the Florida Turnpike to the east, the Miami-Dade/Broward County line to the north, and Kendall

Appendix A to this opinion, AR614 at 16. The entire Lake Belt area is within the "Lower East Coast" region of the Restudy, see AR1152; CERP plans for the area include conversion of two quarry pits into reservoirs ringed with subterranean seepage barriers to protect the underlying Aquifer.[46] The Northwest Wellfield is located in the Lake Belt (toward its eastern border).

Mining in the Lake Belt area has been ongoing since the 1950s[47] and, as a result,

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Drive to the south." AR1028 at 2. It also is reported that the Urban Development Boundary (UDB) forms the eastern boundary of the Lake Belt. AR610 at 22.

[46]"Two limestone quarries in northern Miami-Dade County will be converted to water storage reservoirs to supply Florida Bay, the Everglades, Biscayne Bay and Miami-Dade County residents with water. The 11,000-acre area will be ringed with an seepage barriers [sic] to ensure that stored water does not leak or adjacent groundwater does not seep into the area.... This feature includes canals, pumps, water control structures, and an in-ground storage reservoir with a total capacity of approximately 90,000 acre-feet located in Miami-Dade County. The initial design of the reservoir assumed 4,500 acres with the water level fluctuating from ground level to 20 feet below grade. A subterranean seepage barrier will be constructed around the perimeter to enable drawdown during dry periods, to prevent seepage losses, and to prevent water quality impact due to the high transmissivity of the Biscayne Aquifer in the area. The reservoir will be located within an area proposed for rock mining.... The purpose of this feature is to capture and store a portion of the stormwater runoff from [nearby canals] and to provide water deliveries to Biscayne Bay to aid in meeting salinity targets." AR1152 at ix, 9-19, 9-20.

[47]"Companies have acquired property and mined limerock from open-pit quarries in the area now known as the Lake Belt since the 1950s under Miami-Dade County zoning and wetland permitting regulations." AR1028 at 35. "Rinker has purchased or leased thousands of acres of property in the Lake Belt area. Most of Rinker's property has been owned for many years.... Rinker's flagship operation is the FEC Quarry. This quarry has been in continuous operation since the early 1970s and is the largest aggregate quarry (by volume) in the United States – producing approximately 13 million tons of finished aggregate annually.... The FEC quarry also has a concrete pipe plant, a concrete redi-mix plant and a concrete block manufacturing plant.... The SCL quarry was opened in 1958 by LeHigh Cement and was purchased by Rinker in 1976. Since Rinker's purchase, SCL has been in continuous operation – the Miami Cement Mill operates 24 hours a day, seven days a week.... Rinker is also the operator of the Kendall Krome quarry. This quarry excavated limestone for the production of Portland

approximately 5,000 acres of quarry pits already existed at the time the ROD was issued in 2002, i.e., approximately 10% of the Lake Belt area already was a quarry pit. AR1028 at 58. Indeed, rock mining and agricultural use already had altered approximately 30% (i.e., approx. 17,254.5 acres) of the Lake Belt, primarily affecting the wetlands lying to the east of the Dade-Broward Levee, as well as those wetlands south of Tamiami Trail, i.e., closest to the border of Everglades National Park. In the remaining unaltered 70% of the area, the invasive and destructive melaleuca plant is expanding rapidly in a westerly direction, AR1028 at 4, due – at least in part – to the actions of the mining industry itself over the past decades.

Melaleuca, which has been declared a Federal Noxious Weed and a Florida Prohibited Aquatic Plant, negatively affects wetland functions and "threaten[s] the core of the Everglades ecosystem." AR614 at 39-40, 382-83, 419.[48] Rock mining (and construction of required roads and large work pad areas) is one of the "[a]biotic factors that have influenced the current distribution of the cover types [including melaleuca] in the Lakebelt Region," AR614 at 38-39, 383. This unnatural activity has shortened hydroperiods and disrupted surface water sheet flows, resulting in "the alteration of the

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cement from the 1950s until the late 1970s. While cement is no longer produced at Krome, the aggregate portion of the operation continues ...." See Affidavit of Rinker President, Exh. 1 to Docket Entry #34.

[48]The Court observes the irony that melaleuca originally was believed to be a benefit to the South Florida environment. Melaleuca was "introduced into Florida from Australia in 1908, and again in 1912, by private entrepreneurs hoping to utilize the extraordinarily high evapotranspiration rate of the tree to dry up swamp land, and at the same time produce commercial wood or timber." AR204 at 21-22 (this report is a discredited report which was submitted to the United States Bureau of Mines; the report cites a personal conversation with DERM staff in 1993 as the source of the information about melaleuca, cited here solely for the observation above).

historical long hydroperiod wetlands to shorter hydroperiod prairies, causing shifts in vegetative species composition and species richness." Id. "Since its introduction into South Florida in 1906, Melaleuca has become established in areas that were historically wetlands, especially those stressed by reduced hydroperiods." AR614 at 39.[49]

Mining not only has caused a greater infestation of the exotic melaleuca, but also "has created extensive areas of deep water habitat, which do not naturally occur in southern Florida." AR614 at 39, 383. The mining industry claims that these lakes will be of recreational benefit and, moreover, that the lakes actually prevent the further spread of melaleuca -- but the recreational benefits will be limited and the claim of melaleuca control is disputed.[50] In addition, the lakes are of questionable environmental value; for example,

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[49] Interestingly, the mining industry has argued, and the Corps has agreed, that the melaleuca-infested character of portions of the Lake Belt wetlands justifies their further degradation -- indeed, destruction -- by mining. AR614 at 383, 420. "The majority of this [mining] impact would occur to melaleuca infested wetlands, which would have a positive benefit of removing a potential seed source of this highly invasive exotic species." AR614 at 83. "The 41,000 acres mining area [referencing a longer term mining plan] is virtually all a seriously degraded wetland." AR22 at 5. It seems unusual that an industry's permission to engage in further environmental destruction is partially derived from the destruction already attributable, at least in part, to that industry's prior actions.

[50] An internal NPS document is illuminating:

> The argument that the creation of deep lakes would help diminish the threat of melaleuca flies in the face of a decade of successful battles against melaleuca. Land managers have been using best management practices advocated by the Florida Exotic Pest Plan Council's "Management Plan for Melaleuca in Florida". Rock-mining is not one of those practices. Conventional integrated pest management actions (a combination of mechanical, chemical, and biological control measures) is proving very effective in reducing the establishment and distribution of melaleuca. Unlike rock-mining, these accepted control activities do not result in the irreversible loss of wetlands, but in their recovery. Native wetlands can be reclaimed from melaleuca infested wetlands; we have seen this within the [Everglades National Park] and elsewhere. Furthermore, melaleuca

the presence of the lakes increases the seepage of precious groundwater from other Everglades wetlands.[51] The deep lakes are particularly problematic when located in proximity to the L-31N Levee/Canal which lies near the border of ENP, to the south of Tamiami Trail.[52] The L-31N "cuts through an area of extremely high groundwater flow, most of which originates from [the Park].... The key to improving water conditions in ... , especially for the Everglades, is controlling the seepage quantities now leaving the Park in a way that both minimizes the total amount of flow and returns as much of this flow as possible to the Park.... The quarries ... do result in an increase in groundwater flow to the

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> infested areas, while floristically poorer than natural marshes and prairies, do have ecological value because they are still wetland communities and support plants and wildlife.

SAR1336 at 2386. Although this document appears in the SAR, it reportedly was before the Corps as early as August 18, 2000, but was omitted from AR666 when the record was produced, see SAR1336. Another document omitted from AR666 noted that "Melaleuca will invade those [shelves around the quarry pits] just as it does in any wetland community in southern Florida ...." SAR1336 at 2472.

[51]The mining industry has expressed concern that the Lake Belt area not be confused with the broader Everglades – asserting that the Lake Belt is no longer part of the Everglades ecosystem. "[W]e have to make certain there are no misconceptions related to Everglades issues. The area East of Krome Avenue and the L-31 Canal used to be part of the Everglades but was hydrologically cut off by the [C&SF] project in the early 1950's. Historical drainage used to be toward the west into Shark River Slough by sheet flow and ground water flow. Now drainage is reversed." AR19 at 7. "The Lake Belt area is located in former Everglades wetlands." AR22 at 8. The area "was severed from the Everglades in the 1950s." Intervening Defendants' Reply brief, Docket Entry #44, at p.3. These arguments are not addressed herein, as the Federal Defendants admit that the wetlands at issue are "Everglades wetlands." AR1028 at 2; Federal Defendants' Memorandum, Docket Entry #33 at 7.

[52]ENP noted that the mining was proposed to be as close as 1,000 ft to the L-31N levee, which would directly impact the hydrologic conditions in the adjacent marshes of ENP, and that "mining has never been permitted this close to a primary water supply conveyance canal, such as L-31N." AR825. Mining in the first ten years is permitted as close as 1,000 ft from the L-31 canal. AR825, AR977.

east [i.e., away from the Park]." AR614 at 230, 241, and Appendix A. For example, studies suggest that mining the entire Krome Quarry tract (Kendall Properties, closest to the ENP boundary), when compared to mining only the previously permitted lakes, may cause as much as an 11% increase (i.e., an additional 3 cubic feet per second per foot (cfs)) in seepage from the Park during the dry season, AR614 at 244; the Pennsuco also may be affected, with an average reduction of 35 days in the length of its hydroperiod as compared to the situation of mining only the permitted lakes in the area, AR614 at 244.[53]

It is beyond question that limestone is a valuable product of the environment, and the record suggests that a good quality and quantity of limestone exists under the Lake Belt wetlands and other areas of Miami-Dade County.[54]

> The limestone rock resource found in the Lake Belt Area is of high quality. The resource is an important public resource needed for the continued growth and prosperity of the State of Florida. This was recognized by the State Legislature .... Rock in the Lake Belt is one of the few deposits in the State that meets Department of Transportation requirement [sic] for hardness and chemical content. Rock from the Lake Belt supplies much of Dade County and 40 percent of the State's rock, sand and cement for concrete, asphalt and road base [see EIS, Appendix I]. As other mining areas in the State are depleted, the Lake Belt Area is expected to supply a greater percent of the State's rock in the future.

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[53]Similarly, seepage from WCA-3B toward the west might increase 5% (16 cfs) during wet periods and 4% (9cfs) during dry periods when compared to mining only the permitted lakes. AR614 at 244.

[54]"The Dade County deposit spreads under the urban areas and out into the wetlands of the water conservation areas.... Mining is incompatible with urban land uses (it is very heavy industry) and also incompatible with the high quality wetlands of the conservation areas. The narrow strip of mining lands is classified as a wetland but this wetland has been seriously degraded by drainage and by infestation by Melaleuca, an exotic tree species imported from Australia in about 1900...." AR22 at 4 ("The South Florida Limestone Mining Coalition Year 2050 Fresh Water Lake Belt Plan," issued June 15, 1992). "The 20,000 acres of deep mining included in the Lake Belt Plan would take approximately 60 years to complete at the rate of 300 to 400 acres per year. The project should thus be complete in the year 2050." AR22 at 7.

AR1028 at 82.[55] The mining industry also has attempted to establish that Lake Belt limestone is of particular importance to the entire State. "That Florida has extremely limited resources of construction grade rock is demonstrated by the fact that this expensive-to-transport material was used to build Cape Kennedy and Disneyworld [sic], both more than 150 miles north of Dade County." AR209 at 1-2.[56]

In addition to the existing quarry pits, agricultural uses, and melaleuca-infested areas, the Lake Belt also includes an area of relatively undisturbed wetlands, i.e., wet prairies of high functional value,[57] described as the Pennsuco[58] wetlands and comprising

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[55]The argument that Lake Belt rock is one of the only rock types to be approved by the Department of Transportation ("DOT"), and thus mining must continue, is specious. Indeed, the DOT's "Standard Specifications for Road and Bridge Construction, Edition of 1986," provide that "limerock of either Miami or Ocala formation may be used." AR19 at 27. Moreover, Plaintiffs note that the mining industry actively engages with state officials to define what rock should be used. "The Lake Belt miners have successfully lobbied the FDOT to incorporate the Dade County limerock specifications into the FDOT roadbed material standards." AR549/FAR123.

[56]There is nothing in the record to support these broad and impressive statements by Paul Larsen regarding Disney World and Cape Canaveral/Kennedy Space Center except one handwritten note, which seems simply to report the amount of concrete required to build a particular hotel. "Dolphin Hotel, 45,000 cy of concrete which required about 40,000 T. of aggregates. Disney does not like to give out this kind of information – picture is hard to find." AR19 at 93. The Corps included Larsen's report in the EIS, as Appendix I, AR614 at 934, apparently adopting his statement therein that "both Disneyworld and Cape Kennedy [sic] were constructed from Lake Belt Rock."

[57]The Corps employs a detailed method for determining the relative value of wetlands. The 1987 Corps of Engineers Wetlands Delineation manual, *reprinted in* Margaret N. Strand, Wetlands Deskbook (2d ed. 1997), is used by both the Corps and EPA, see Interagency Memorandum of Agreement Concerning Wetlands Determinations, effective January 6, 1994, *reprinted in* Margaret N. Strand, Wetlands Deskbook (2d ed. 1997). In 1997, the Corps introduced the "hydrogeomorphic" (HGM) method of functional assessment of wetlands, which focuses on "the wetland's position in the landscape, its water source, and the flow and fluctuation of water once it is in the wetland." Linda A. Malone, Environmental Regulation of Land Use, §4:5, at 4-8.1

approximately 13,000 acres located west of the Dade-Broward Levee and north of Tamiami Trail. AR618 at 226, AR1028 at 4. Mining companies own a total of 46% of the Lake Belt, governments own 19%, and the other 35% is owned by private landowners.[59] Some of the mining companies own land in the Pennsuco, and the ROD reports that such property (approximately 9% of the miners' total land in the Lake Belt) will be sold for wetland restoration. AR1028 at 58.[60] Approximately 331.5 acres (of non-Pennsuco wetlands) are planned to be mined in each of the first ten years – including some mining that was authorized under the previous permits. AR1028 at 116. (That totals only 3,315 acres of mining, but the ROD permits describe 5,409 acres of mining.)

To frame the issues in this case, it is important to have a basic understanding of the mining activities that are occurring as a result of these contested permits. "Rockmining is a heavy construction operation. It involves blasting, heavy equipment operations such as draglines and dozers, walking and driving over harsh terrain, involvement with rock crushing heavy equipment with long conveyor belts, driving heavily loaded trucks and other

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(Supp. 2005).

[58]The Pennsuco Wetlands are named after the Pennsylvania Sugar Co. See Michael Grunwald, "Between Rock and a Hard Place," Washington Post, June 24, 2002, at A-1.

[59]There are approximately 1,800 non-mining landowners, and this property is predominantly vacant or used for agriculture or rural residences. AR1028 at 5, AR617.

[60]It is unclear what price will be paid (even the question of which "appraised value" will be used), or by which governmental entity, to purchase this property from the miners, nor is it clear whether or how this transaction factors into the mitigation plan, if at all; nor is the arrangement binding. AR1028 at 70.

hazardous type activities." AR1028 at 82.[61] "Heavy trucks transporting the rock to railroad loading sites add to the heavy traffic congestion," AR1028 at 82, and "approximately 2,000 trucks serve the local market in Dade and Broward counties...." AR19 at 9.[62] "[M]ining ... involves unavoidable noise and certain amounts of dust." AR19 at 5. The soil removed prior to blasting "is predominantly organic muck typical of [drained] Everglades marsh .... [which] overlies limestone bedrock."[63] AR1028 at 56. "The rock is excavated down to a depth of 80 feet [and after] excavation, muck is placed back on the 100-foot-wide limestone shelf .... Upon completion of the mining activities, there is a total conversion of the physical substrate from a wetland to a deep lake with a 100-foot littoral shelf along its perimeter." AR1028 at 56.[64] The "deep lakes" or quarry pits, which are between 60 - 80 feet deep, fill

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[61]The use of a "dragline" in limestone mining has been described as follows: "the mode of mining .... is to place a mechanism, called a 'dragline,' on solid ground, remove the muck overlay, dump it temporarily on the ground, remove the limestone thus made accessible with aid of blasting as necessary, dump some of the previously removed limestone or muck into the hole to make a solid foundation to which the 'dragline' can be moved, and commence another phase." Florida Rock Industries, Inc. v. U.S., 791 F.2d 893, 895 (Fed. Cir. 1986).

[62]The Florida Department of Transportation submitted comments in response to the EIS, raising concerns about impaired traffic mobility issues caused by the increased truck and train traffic originating from the mining areas. AR657.

[63]"Mined material comes from the Miami Oolite formation, which underlies almost the entire county. The formation is about 40 ft. thick and dips very gently toward the east. The Miami-Dade County limestone area is situated over a wedge of the Miami Oolite that thickens from a feather-edge along Everglades National Park eastward toward the western suburbs of the city of Miami." AR204 at 18 (discredited Bureau of Mines report – cited here for limited purpose of describing background geological conditions).

[64]Clearly, there is much more involved in the mining process than described above, including the steps taken by the mining industry to protect the surrounding area, the construction of an infrastructure to permit access to the area by the trucks and subsequent travel to railroads or other departure points, etc. The Court simply offers

with water seeping in from the Biscayne Aquifer --with which the pits interact directly -- and are added to by rainfall.

The mining companies sell the limestone rock and several related products, and at least two of the companies manufacture cement from the rock. The miners claim to need a 50 year plan to provide the certainty that they need to continue in business, AR610 at p.8,[65] because of the "enormous capitol [sic] expenditure required by this industry." AR19 at 9. They also assert that they expect permits to continue to be issued for mining.

> The nature of the industry demands that considerable capital investments be made in heavy equipment and processing plants. These investments often have depreciation schedules greater than the length of a typical Permit. The industry recognizes that Corps permits have expiration dates, and, barring a change in the Clean Water Act, there is an expectation of continued permitting. This is not to say the permits cannot be allowed to expire or revoked, but that the basis for the permit termination should be based on new information on environmental or other impacts that indicate mining would be contrary to the public interest or be illegal under other laws.

AR1028 at 36.[66]

While mining occurred freely in the 1950s and 1960s, the regulatory environment

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this brief overview of the process as context for the substantive issues addressed in this opinion – indeed, the specifics of the mining industry, beyond what is described in the administrative record, are of no relevance to this Court's determination.

[65]The 50-year footprint reflects the industry's expectations of the quantity of rock the public will buy. AR1028 at 39.

[66]"[Processing plants, cement mills] cannot be moved.... Total capitol [sic] investment in this industry is in the 'ball park' of 800 million dollars. A 'ball park' value for roughly 20,000 Acres of land is 200 to 300 million dollars. **Thus, the Dade County Industry is easily a billion dollar industry**." AR19 at 9 (emphasis in original). The Court finds no independent support for this statement in the record and doubts that it would not stand under any level of scrutiny of the corresponding data.

changed significantly in the late 1970s.[67] The United States, acting through the Corps, began requiring permits under the CWA for mining activities being conducted in wetlands.[68] The County also, in 1975, produced its first Comprehensive Master Plan,[69] which, according to the mining industry, "recognized and approved the ongoing mining industry in the Lake Belt Area." AR610 at 22. According to the County's land use report prepared for inclusion in the EIS, rock mining is an allowable use in "general use" or "agricultural" zoning categories, AR614 at 59, which exist throughout most of the Lake Belt -- with the notable exception of the Pennsuco wetlands, which are designated for "Environmental Protection" (although the area also includes some general use and agricultural zoning).

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[67]"After passage of the Clean Water Act in 1972, the Corps began regulating the industry ... [and] has issued a number of ... permits ... related to the mining." AR1028 at 35. The Corps has defended the current permits by referring to the fact that "both the state and Dade County have over the years either condoned or encouraged rock mining in this area." AR778.

[68]Some of these permits were issued to the mining companies represented in this action. See, e.g., AR1028, Table G (Table showing some permits to these companies which appear to have been issued as early as the late 1970s). According to an EIS issued by the Corps in March 1983 regarding limestone mining in this area, the Corps received 43 applications in 1979-80 for Section 404 (Clean Water Act) permits for limestone mining in the four South Florida counties being studied at that time: Dade, Broward, Monroe, and Collier. The majority of the applications were for sites in the general vicinity of the area now known as the "Lake Belt." AR2, p. 11. That EIS evaluated three alternatives for the excavation and use of limestone in South Florida: maintain the status quo (i.e., mining could continue consistent with existing regulations – no further regulations were required); eliminate mining in the subject wetlands; or permit mining only in selected areas based upon approved criteria. The ROD subsequently issued upon that EIS determined that the third alternative was preferable, as it would "insure all cultural, biological, chemical, and physical conditions in each area will be evaluated at the time of permit decision." AR3, p. 2.

[69]The County adopted a new Comprehensive Development Master Plan in 1988, see City Nat'l Bank of Miami v. United States, 33 Ct.Cl. 224, 225-26 (1995).

AR614 at 62, 805 - 823, Appendix E, Lake Belt Land Use Report.[70]

The exercise of regulatory jurisdiction by the Corps over the actions of one limestone mining company (Florida Rock, an intervening defendant in the present action), resulted in the commencement of litigation in 1982 challenging the denial of mining permits as an uncompensated regulatory taking. That litigation, as previously noted; appears to have played an important role in the relationship that developed between the mining industry and the Corps – as evidenced in the permitting process presently before this Court. Because of its importance,[71] and also because it represents a somewhat unusual interpretation of federal takings jurisprudence, the Court will address the Florida Rock case here in some detail.

At the commencement of the inverse condemnation action in the early 1980s, Florida rock conceded the legitimacy of the Corps' permitting decision, i.e., the denial of a permit for three years of mining on 98 acres wetlands.[72] In May 1985, the Court of Claims held that denial of the mining permit constituted a taking, thereby rejecting the Government's suggestion that other uses for the property remained, and awarded $1,029,000 (i.e., $10,500 for each of the 98 acres, that had been purchased originally by

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[70]A full discussion of land use regulations, including the availability of exemptions or "unusual use" permits which might allow variances from established zoning or regulations, is beyond the scope of this opinion.

[71]The case ultimately settled for $21 million in 2001, after a lengthy battle -- including two trips to the Federal Circuit (with reversals).

[72]The property was located in the Pennsuco area of the Lake Belt.

Florida Rock for $1,900/acre).[73] Florida Rock Industries, Inc. v. U.S., 8 Cl. Ct. 160 (1985) (then Chief Judge Kozinski).[74] The Federal Circuit reversed that decision. Although not disagreeing that a taking had occurred, the court noted that the Claims Court's written findings – which conflicted with that court's earlier oral announcement[75] – that there was no threat of pollution to the wetlands related to the temporary turbidity caused by the mining, presented a potential conflict with the Corps' right to exercise permitting authority and such conflict may have improperly influenced the takings determination. The court also noted that speculative future uses could be considered in the valuation of the property and that the fair market value, not the "use value formula," should be applied. Florida Rock Industries, Inc. v. U.S., 791 F.2d 893 (Fed. Cir. 1986).[76] The Claims Court again, in July 1990, found a taking and reinstated the prior finding that the property was valued at $10,500 per acre. The court rejected the Government's evidence of comparable sales

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[73]The Claims Court ignored evidence that Florida Rock had received numerous unsolicited inquiries and been offered $4,000 per acre by a buyer, even after the permit denials and without advertising the property for sale. Florida Rock Industries, Inc. v. U.S., 791 F.2d 893 (Fed. Cir. 1986).

[74]The Claims Court also awarded attorneys' fees and costs in a total amount of $500,000. Florida Rock Industries, Inc. v. U.S., 9 Cl. Ct. 285 (1985) (Chief Judge Kozinski).

[75]One year had passed since Chief Judge Kozinski had announced his oral ruling, which reportedly was his common practice. Fla. Rock Indus., 791 F.2d at 899.

[76]The court noted that the lower court should not have ignored the possibility that a speculator might be willing to purchase the property despite the then-current regulatory scheme, because "our descendants may know things we do not even suspect. There is nothing so certain in life as that all certainties become uncertain, and some are replaced by their opposites. One who invests in land on this faith may be a speculator, but he is not on that account a gull." Fla. Rock v. United States, 791 F.2d 893, 903 (Fed. Cir. 1986).

and, instead, relied on Florida Rock's demonstration that their property had suffered a 95% reduction in value because purchasers who were knowledgeable about the wetland restrictions would not pay full price for the property. Florida Rock Industries, Inc. v. U.S., 21 Cl. Ct. 161 (1990). The Federal Circuit, in 1994, again reversed the decision and the valuation method -- criticizing the value placed on the property, and remanding for an analysis as to whether a taking actually had occurred, i.e., whether all economically beneficial use of the land had been denied. Florida Rock Industries, Inc. v. U.S., 18 F.3d 1560, 1562, 1564-67 (Fed. Cir. 1994). For a third time, the Claims Court, in 1999, found that there had been a taking, noting that Florida Rock bought land and started mining before the CWA dredge and fill permit system was created, that mining was the only economically viable use of the property, that the property suffered a 73.1% decrease in value because of the permit denial, and that Florida Rock couldn't recoup its investment by selling the property. Florida Rock Industries, Inc. v. U.S., 45 Fed. Cl. 21 (1999).[77] Shortly thereafter, the claims court also ruled that repeated applications for permits to mine the remaining 1,462 acres (of Florida Rock's total 1,560 acres) would be futile, such that Florida Rock should receive compensation for these acres as well.[78] The court certified its

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[77]In 1992, Congress changed the name of the United States Claims Court to the Court of Federal Claims.

[78]The claims court observed that Florida Rock had a business plan based on mining its entire 1560 acres over many years and that almost two-thirds of the time had passed as a result of the permit denial so the corporation "deserved" a determination as to whether the probable denial of permits for the remaining acres constituted a taking. Evidently the Claims Court did not entertain the possibility that the property might attain a value at some future date, which is peculiar because Florida Rock was not intending to mine its entire 1,560 acre parcel immediately -- indeed, its permit application was for the 98 acres it planned to mine in three years, and at that rate the 1,560 acres would have lasted 47 years. To have found a taking as to the entire parcel based upon the

ruling for immediate appeal to the Federal Circuit. Florida Rock Industries, Inc. v. U.S., 2000 U.S. Claims LEXIS 50 (2000). While the Government's appeal of that decision was pending[79] before the Federal Circuit, the parties reached a settlement which dismissed the Claims Court judgment and the appeal. Law of Wetlands Regulation, pp. 10-15. The settlement for $21 million bears little relation to the early pronouncement by Chief Judge Kozinski that compensation for the entire 1,560 acres parcel would be $10,580,000, plus interest. Florida Rock Industries, Inc. v. United States, 791 F.2d 893, 895, 897 (Fed. Cir. 1986). Although there has been significant public opposition to this mining for the past several years, as demonstrated by the substantial number of objections lodged in the administrative record, the Florida Rock litigation was a powerful reminder of the financially costly consequences of the Corps' permitting decisions.[80]

In 1991, after its second victory before the Claims Court, the mining industry approached officials from the State of Florida, Dade County, and the Corps "with the idea

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corporation's business plan is an interesting result also because, as the Federal Circuit noted, owners of property generally are not compensated for governmental "frustration of business expectations," Florida Rock Industries, Inc. v. U.S., 791 F.2d 893, 903 (Fed. Cir. 1986).

[79]Florida Rock's appeal was dismissed as having been untimely filed. Florida Rock Industries, Inc. v. U.S., 2000 U.S. App. LEXIS 21752 (Fed. Cir. Aug. 3, 2000).

[80]"One may speculate whether the significant recent reduction in the annual number of permit denials by the Corps of Engineers was influenced by the greater vulnerability of outright denials, as opposed to conditioned approvals, to takings actions. Nor, in this regard, does it take more than an occasional adverse court decision to maintain the hot breath of taking liability on the regulator's neck." Robert Meltz, "Wetlands Regulation and the Law of Property Rights 'Takings'," Congressional Research Service Report for Congress (2000), available at http://ncseonline.org/nle/crsreports/wetlands/wet-6.cfm (referencing report that Corps denied only 3.2% of permit applications in fiscal year 1998, as compared to 8.8% denied in fiscal year 1992).

of coordinating permitting" to "maximize limestone recovery"[81] by connecting adjacent quarries (instead of having to stop inside of property lines). AR19, AR1028 at 35. The industry also proposed to "utilize the resulting contiguous lake[s] for public recreation" and to "restore a large contiguous area of the Everglades known as the Pennsuco." AR1028 at 35. As part of their "South Florida Limestone Mining Coalition Year 2050 Fresh Water Lake Belt Plan," the miners would mine 300 to 400 acres per year for approximately 60 years, for a total of 20,000 mined acres by the year 2050. AR22.[82]

Apparently in response to the miners' pitch, the Florida Legislature created a committee of agency and industry representatives to study and review future mining activities. The Dade County Freshwater Lake Plan Implementation Committee ("Committee") was established, according to Fla. Stat. §373.4149, to "develop a plan which: enhances the water supply for Dade County and the Everglades, maximizes efficient recovery of limestone while promoting the social and economic welfare of the community and protecting the environment; and educates various groups and the general public of the benefits of the plan."

The Committee was chaired by the regional water management district, the South

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[81]In a presentation to the Florida Department of Environmental Regulation (now known as the Florida Department of Environmental Protection ("DEP")), the miners noted that "it has been estimated that each new Florida dwelling unit and its residents require 200 to 300 tons of rock for the unit, its parking space, the roads leading to it, and environmental needs for water and sewer, etc." AR19 at 4.

[82]The mining industry was "trying to avoid having this proposal treated as a permit application. We do not want to get locked into a specific plan." AR93.

Florida Water Management District ("SFWMD")[83], and did not include any federal agencies as voting members. The Corps, EPA, and FWS all shared "ex-officio" status with selected Florida legislators. AR395, AR1028 at 35. Originally there were thirteen voting members on the Committee, four of whom were from the rock mining industry, and three of whom represented environmental organizations (including Plaintiff Sierra Club); two more members were added in 1994, AR395 at15, 18.[84] At some point before June 2000, two additional non-mining landowners were added to the Committee.

In June 1992, the mining industry, acting as the South Florida Limestone Mining Coalition (Coalition) presented its "Year 2050 Fresh Water Lake Belt Plan" to the Committee. Environmental, land use, and water quality concerns were raised swiftly by DERM to the Lake Belt Committee, the SFWMD, and the Corps. AR44-46.[85] Immediately

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[83]As early as February 1996, senior Corps staff expressed concern that "[SFWMD] may have already bought in to the miners' plan," AR271, and that the miners seemed to have SFWMD "on board" with the miners' proposal. AR270.

[84]Plaintiffs claim that the Lake Belt Committee had a clear bias in favor of approving rock mining. According to members who served until 1998, the Committee was "dominated by rock miners, their supporters, and state employees focused on maximizing the recovery of limestone" (Declaration of Barbara Lange, Committee member 1996 - 1998, 2000), and it was apparent that "the Committee's focus was to endorse extensive rock mining activities while paying mere lip service to environmental issues" (Declaration of Roderick Jude, Committee member 1992 - 1998). See Plaintiffs' Memorandum in support of Motion for Summary Judgment, Exhibit 2. According to Ms. Lange and Mr. Jude, the Committee refused to acknowledge Sierra Club's opposition to the Committee's major report, in 2000, i.e., the "Phase II Plan" -- which was the culmination of the Committee's 8 years of work. The Sierra Club letter of objection appears at page 458 of the 529 page document). The Corps also complained, in November 1996, of a pro-mining bias from the Committee. "[A]ll we get from miners and Committee is plans skewed toward serving their interest. We need a middle ground approach." AR341.

[85]The County questioned whether the plan for mining was a viable option for South Florida, and insisted that the Committee study whether there were "no feasible

recognizing that the issuance of mining permits in these wetlands would constitute a "major federal action," the Corps formally advised the SFWMD in July 1992 that an EIS was required, AR38, and in the fall of 1992 the Corps issued a "Fact Sheet" announcing that an EIS would be developed concerning a proposed area of 54,000 acres, including 19,600 acres of proposed lakes, 4,000 acres of existing lakes, 17,000 acres of constructed wetlands, and 13,000 acres of wetland preservation and maintenance areas.[86] The Corps previously had prepared an EIS on mining in this area in 1983, concluding that permit applications would be reviewed on a "case-by-case basis," as it was "essential that mitigation requirements be flexible to reflect the needs of the people, the socioeconomic values and industrial demands, and future technical data ....." AR3. When the Corps conducted the EIS for the present mining, it abandoned its original approach.

Interagency discussions were held to prepare a scope of work for the new EIS and to identify partners for support of the endeavor. A meeting was held at DERM in October 1992 to discuss the necessary biological studies, and in November 1992 the FWS advised the Corps that, while the Service would cooperate on EIS preparation, it did not have funds for doing vegetative and wildlife and mitigation analyses. AR83. Also, the U.S. Geological Service declined to participate formally as a cooperating agency but offered to assist by providing any of its existing information. In December 1992, technical staff from SFWMD met with the Coalition and other agencies to discuss alternative designs for the

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alternatives" for the mining. AR44, AR45. The County also observed that limestone quarrying is not included in the list of uses that may be considered for approval in the Dade-Broward Levee basin. AR45.

[86]The "Fact Sheet" identified the mining coalition as Rinker, Tarmac, and White Rock (an earlier version included Florida Rock, Union Rock, and Vulcan).

environmental studies.

The Lake Belt Committee issued reports to the state legislature and initiated several studies designed to understand the function and quality of the wetlands within the Lake Belt Area, including two-year studies initiated in 1994 on the functional value of the vegetation, wildlife, and existing lakes within the Lake Belt Study Area. Phase I of the Lake Belt Committee's Report and Plan were submitted to the Florida Legislature in February 1997 ("Making a Whole, Not Just Holes"). AR433.

In January 1997, an Issue Advisory Team was created by the South Florida Ecosystem Restoration Task Force Working Group[87] to draw a map and analyze alternative mining scenarios. The Team included subcommittees to study mitigation and wellfield protection, and an agency sub-subcommittee that would debate the application of a functional assessment of the existing wetlands in order to reach an acceptable mitigation ratio. AR562. The issue team's report was completed within a few months, and was presented to the Working Group in July 1997.

The Corps began circulating a preliminary draft of the EIS, with respect to mining on 15,800 acres over a fifty year period at least as early as 1997; additional review continued as the Corps began receiving comments on the draft EIS. In October 1997, the Florida Legislature issued a clear directive to the state and local agencies.

To further streamline permitting within the Miami-Dade County Lake Belt, the [DEP]

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[87]The Working Group was established by the South Florida Ecosystem Restoration Task Force, which itself was created by the 1996 WRDA. The Working Group includes federal, state, and local agency representatives, as well as tribal and environmental representation, and supports the work of the Task Force by coordinating the development of consistent policies regarding the restoration and preservation of the South Florida ecosystem. See http://www.sfrestore.org/wg/index.html.

> and Miami-Dade County are encouraged to work with the United States Army Corps of Engineers to establish a general permit under s. 404 of the Clean Water Act for limerock mining activities within the geographic area of the Miami-Dade County Lake Belt consistent with the report submitted in February 1997. Miami-Dade County is further encouraged to seek delegation from the United States Army Corps of Engineers for the implementation of any such general permit.

Fla. Stat. §373.4415. "Further, the reclamation program shall maximize the efficient mining of limestone, and the littoral area surrounding the lake excavations shall not be required to be greater than 100 feet average in width." Fla. Stat. §378.4115 [amended 1999, 2001].

Applications for new permits already had been submitted to the Corps as early as July 1998,[88] and others were received while the Corps was preparing the EIS. AR1028 at 11.[89] In February 1999 the draft EIS, AR578, was distributed and it was published in the Federal Register on March 8, 1999. AR614 at 895. Although strong objections were received from a number of sources regarding the EIS, the Corps continued drafting and circulating revised text for the permit templates, AR591, even though the Corps had yet to conduct an evaluation of practicable alternatives to the mining. In mid-December 1999, the mining industry provided a report prepared by Paul Larsen, "Analysis of the Practicability of Non-Lake Belt Alternative Sources to Supply Florida's Demand for Basic Construction Materials," which was included as Appendix I to the final EIS.[90]

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[88]Sunshine Rock's application was received on July 30, 1998. AR1028 at 11.

[89]By the time that the final EIS was issued in June 2000, the Corps considered all permit applications complete. AR1028 at 11.

[90]Recall that in 1994, the Federal Circuit had reversed the finding of a taking of Florida Rock's property, and the Claims Court didn't reinstate its ruling again until 1999, so the parties' issues were unresolved during those five years – even though the threat of a significant judgment against the United States remained. During this time of uncertainty in the Florida Rock litigation, EPA and others insisted that the takings case be resolved as part of the overall agreement with the miners' proposed plan. AR559

The final EIS was issued in June 2000, accompanied by a Public Notice of intent to issue permits for fifty years of mining. AR1028 at 11. A multitude of objections were received from environmental groups, AR666 (Sierra Club and others); individuals, AR775, AR786[91], AR830; governmental agencies, AR669 (NPS), AR671 (FWS), AR705A (EPA), AR712 (Department of the Interior), AR791B (DERM); private corporations, AR579[92], AR745; and the Miccosukee Tribe, AR605. Several requests for a public hearing were received. AR664, AR667, AR678.[93]

In February 2001, the Lake Belt Committee submitted its Phase II plan to the Florida

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(EPA, March 16, 1996), AR498 (DEP, July 14, 1997). The mining industry walked out of a March 18, 1998, meeting reportedly because they "were upset about settlement of [the] takings case and areas of mitigation to be determined as a result of Lake Belt process." AR560. Soon thereafter, the Florida Legislature passed the Lake Belt bill and the DEP pushed for a resolution of the takings case so that lands in the Pennsuco could be exchanged and committed for mitigation. AR566. The Corps' position was that the takings settlement should be a comprehensive package and that without its resolution there would be "no deal for [the mining] consortium." AR566. Corps staff expressed concern that paying Florida Rock might reveal that the Government was paying more than fair market value, AR557, which would impact the future ability to purchase lands for mitigation at a reasonable price.

[91]Property owners adjacent to one of the quarries objected that blasting from mining was causing cracks in their house foundations, pools, etc. AR789. One of the Miami-Dade County commissioners attended a Lake Belt Committee meeting on July 20, 2000 (just one month after the final EIS was published), and noted that a County Blasting Task Force had "wanted to limit the frequency and intensity of blasting but without the Task Force's knowledge, the rock-mining industry got a bill passed in the state legislature that pre-empted local regulation of blasting and established the blasting intensity." AR681 at 3.

[92]Atlas Material Testing Solutions objected because the blasting from mining affected the company's ability to test outdoor materials for its clients. AR579.

[93]The requests reference the Corps' announced "public meeting" to be held on August 24, 2000, but there is no evidence in the record that any such meeting occurred, or that the Corps ever held a public hearing.