



PLANNING AND ZONING COMMISSION (P&Z)

Donna A. Keys-District 1

Gregory W. Smith-District 4

Richard H. Baker-Member at Large

Ann Reuter – Non-voting liaison School Board

Craig Fletcher-District 3

George H. C. Lawrence-District 5

Gerard A. Weick-District 2

George Hamner, Jr., Chairman

The Planning and Zoning Commission will meet at **7:00 p.m. ON THURSDAY, May 22, 2008, in the County Commission Chambers** of the County Administration Building, 1801 27th Street, Vero Beach.

THE PLANNING AND ZONING COMMISSION SHALL ADJOURN NO LATER THAN 11:00 P.M. UNLESS THE MEETING IS EXTENDED OR CONTINUED TO A TIME CERTAIN BY A COMMISSION VOTE.

AGENDA

ITEM #1 **CALL TO ORDER AND PLEDGE OF ALLEGIANCE**

ITEM #2 **APPROVAL OF MINUTES**

A. May 8, 2008

ITEM #3 **PUBLIC HEARING**

A. Consideration of Proposed Mining Moratorium Extension

ITEM #4 **COMMISSIONERS MATTERS**

ITEM #5 **PLANNING MATTERS**

A. Planning Information Package

ITEM #6 **ATTORNEY'S MATTERS**

ITEM #7 **ADJOURNMENT**

ANYONE WHO MAY WISH TO APPEAL ANY DECISION, WHICH MAY BE MADE AT THIS MEETING, WILL NEED TO ENSURE THAT A VERBATIM RECORD OF THE PROCEEDINGS IS MADE, WHICH INCLUDES THE TESTIMONY AND EVIDENCE ON WHICH THE APPEAL IS BASED.

ANYONE WHO NEEDS A SPECIAL ACCOMMODATION FOR THIS MEETING MUST CONTACT THE COUNTY'S AMERICANS WITH DISABILITIES ACT (ADA) COORDINATOR AT 772-226-1223, (TDD #772-770-5215) AT LEAST 48 HOURS IN ADVANCE OF THE MEETING.

Meeting may be broadcast live on Comcast Cable Channel 27 – may be rebroadcast continuously Saturday 7:00 p.m. until Sunday morning 7:00 a.m. Meeting broadcast same as above on Comcast Broadband, Channel 27 in Sebastian.

PLANNING AND ZONING COMMISSION

There was a meeting of the Indian River County (IRC) Planning and Zoning Commission (P&Z) on Thursday, May 8, 2008 at 7:00 p.m. in the Commission Chambers of the County Administration Building, 1801 27th Street, Vero Beach, Florida. You may hear an audio of the meeting; review the meeting agenda, backup material and the minutes on Indian River County website www.ircgov.com/Boards/PZC/2008.

Present were members: Chairman **George Hamner**, Member-at-Large; **Gerard Weick**, District 2 Appointee; **Craig Fletcher**, District 3 Appointee; **Greg Smith**, District 4 Appointee; **George Lawrence**, District 5 Appointee; Dr. **Richard Baker**, Member-at-Large.

Absent were **Donna Keys**, District 1 Appointee (excused) and **Ann Reuter**, non-voting School Board Liaison (unexcused).

Also present was IRC staff: George Glenn, Assistant County Attorney; Bob Keating, Community Development Director; Stan Boling, Planning Director; Sasan Rohani, Chief, Long Range Planning; John McCoy and Bill Schutt, Senior Planners; Himanshu Mehta, Environmental Engineer, Utilities Department; Cliff Suthard, Stormwater Division Project Engineer; and Reta Smith, Recording Secretary.

Call to Order and Pledge of Allegiance (6:27:32)

Chairman Hamner called the meeting to order and led all in the Pledge of Allegiance. He welcomed several high school students in attendance at tonight's meeting.

Approval of Minutes (6:28:19)

ON MOTION BY Mr. Lawrence, SECONDED BY Mr. Fletcher, the members voted unanimously (6-0) to approve the minutes of the Mining Workshop dated April 9, 2008 and the Planning & Zoning meeting of April 24, 2008, as presented.

Items Not on Consent (6:28:33)

Chairman Hamner read the following into the record:

- A. Egret Marsh Stormwater Treatment Facility:** Request for major site plan and administrative permit use approval for the Egret Marsh Stormwater Treatment facility. Indian River County, Owner. Environmental Consulting & Technology, Inc., Agent. Located on the southeast corner of 74th Avenue and 4th Street. Zoning Classification: A-1, Agricultural 1 (up to 1 unit per 5 acres). Land Use Designation: AG, Agricultural. (SP-MA-07-05-27/2006100156-57942) **[Quasi-Judicial]**

The secretary administered the testimonial oath to those present who wished to speak at tonight's meeting on any quasi-judicial items.

Mr. John McCoy, IRC Senior Planner, reviewed the information contained in his memorandum dated April 29, 2008, a copy of which is on file in the Commission Office (6:29:09).

ON MOTION BY Mr. Weick, SECONDED BY Mr. Fletcher, the members voted unanimously (6-0) to approve staff recommendation.

Public Discussion

Chairman Hamner read the following into the record:

- A. Review of draft of the Indian River County Comprehensive Plan Solid Waste Sub-Element Evaluation and Appraisal Report (EAR)**

Mr. Sasan Rohani, IRC Chief, Long Range Planning, reviewed the information contained in his memorandum dated April 28, 2008, a copy of which is on file in the Commission Office.

Discussion followed about convenience centers and recycling efforts in the County (7:00:55).

Chairman Hamner read the following into the record:

- B. Review of draft of the Indian River County Comprehensive Plan Economic Development Element Evaluation and Appraisal Report (EAR)**

Mr. Bill Schutt, IRC Senior Planner, reviewed the information contained in his memorandum dated April 19, 2008, a copy of which is on file in the Commission Office (7:02:06).

Mr. Fletcher said he was stunned to learn the County's annual average employment was 43% of the population, which meant 57% of the people did not work. Dr. Baker asked how many hours a week a service worker would have to work in order to make a wage to take care of his basic needs.

Mr. Rohani responded a minimum wage earner would have to work 80 hours per week to afford median cost housing, or at least 40 hours each for a two-parent family. He noted this was only for housing and did not include everything else.

Discussion followed about the challenges facing the service work force in the County.

Mr. Bob Keating, IRC Community Development Director, explained one of the reasons for the Economic Development Element was to see if we could create a better economy with more, higher paying jobs.

Discussion ensued.

Chairman Hamner suggested the members contact Planning staff with specific questions or recommendations regarding this element.

Commissioners Matters (7:21:57)

None.

Planning Matters (7:22:18)

Mr. Boling gave an update on action taken by the Board of County Commissioners (BCC) regarding the Imagine Charter School on 4th Street, including a condition requiring a left turn lane in phase two of the project. He reported with respect to Coral Ridge, the BCC had requested staff keep the extension of 61st Street west to 90th Avenue on the map, and no one had any object to this.

Mr. Boling announced the next mining workshop would be held in the County Commission Chambers on May 22, 2008 at 9:00 a.m., adding the members would also be addressing an extension of the mining moratorium in the next few weeks.

Attorney's Matters (7:24:07)

None.

Adjournment (7:24:11)

There being no further business, the meeting was adjourned at 7:58 p.m.

George Hamner, Chairman

Date

Reta Smith, Recording Secretary

Date



Office of
**INDIAN RIVER COUNTY
ATTORNEY**

William G. Collins II, County Attorney
William K. DeBaal, Deputy County Attorney
Marian E. Fell, Senior Assistant County Attorney
George A. Glenn, Assistant County Attorney

MEMORANDUM

TO: The Planning and Zoning Commission

FROM: For William G. Collins II – County Attorney *WGC*

DATE: May 15, 2008

SUBJECT: Draft Mining Moratorium Ordinance Extension

On April 22, 2008, the Board of County Commissioners authorized the County Attorney's Office to initiate the process of extending the mining moratorium up to an additional six months. Some, but not all workshops have been held. It is clear no new mining regulations will have been considered for adoption prior to the moratorium's expiration on July 10, 2008.

Moratoriums must be adopted by ordinance and after public hearing. Florida Statutes require one public hearing with ten days' notice, however case law in Florida has developed to hold that a moratorium is as significant an event as a rezoning and, thus, must be adopted with at least as much formality and due process as a rezoning. Florida Statutes on rezonings initiated by the County involving more than 10 acres require two advertised public hearings. One must be held after 5:00 p.m. on a weekday, and the second must be held at least ten days after the first hearing. Because case law treats moratorium in the same manner as rezonings in terms of process, this matter is presented to the Planning and Zoning Commission for a recommendation, just as a rezoning application would be presented

to the Planning and Zoning Commission for a recommendation to the County Commission under the provisions of the Indian River County Code.

The Professional Services Advisory Committee considered this matter on May 15, 2008 with the following results:

1. A motion to continue the mining moratorium died for a lack of second.
2. A motion to make no recommendation was approved by a 5-to-2 vote.

RECOMMENDATION:

Open the public hearing, receive input and make recommendation to the Board of County Commissioners on the proposed mining moratorium ordinance extension.

WGC/nhm

Attachment:

draft mining moratorium ordinance extension

cc: Joseph A. Baird – County Administrator
George Glenn – Assistant County Attorney

ORDINANCE NO. 2008-_____

DRAFT

AN ORDINANCE OF THE BOARD OF COUNTY COMMISSIONERS OF INDIAN RIVER COUNTY, FLORIDA, EXTENDING BY SIX MONTHS TO JANUARY 10, 2009 THE MORATORIUM ON THE ACCEPTANCE OF APPLICATIONS AND PROCESSING OF APPLICATIONS FOR MINING ADMINISTRATIVE PERMIT APPROVALS AND ISSUANCE OF MINING PERMITS; PROVIDING FOR PROHIBITION; PROVIDING FOR EXEMPTIONS; PROVIDING FOR CONFLICTS; PROVIDING FOR SEVERABILITY; SETTING FORTH EFFECTIVE AND EXPIRATION DATES.

WHEREAS, pursuant to Section 1(f), Article VIII, of the Florida Constitution and Chapter 125, Florida Statutes, Indian River County is authorized and required to protect the public health, safety and welfare and may exercise any power for governmental purpose except when expressly prohibited by law; and

WHEREAS, pursuant to Section 163.3202, Florida Statutes, Indian River County has enacted land development regulations, consistent with its adopted comprehensive plan, which protect the quality of life in Indian River County; and

WHEREAS, the Board of County Commissioners has adopted Indian River County Code Chapter 934, Excavation and Mining; and

WHEREAS, at its October 23, 2007 meeting the Board of County Commissioners was advised of numerous traffic hazards and accidents involving mining trucks on unpaved haul routes; and

WHEREAS, the Board has determined improvements must be made to the notice and traffic safety provisions of Chapter 934; and

WHEREAS, the Planning and Zoning Commission considered this matter and made a recommendation of approval of a mining moratorium on December 13, 2007; and

WHEREAS, the Board of County Commissioners held two public hearings on a proposed moratorium on mining, heard public input, and adopted Ordinance No. 2008-001 on January 7, 2008, effective January 10, 2008; and

WHEREAS, holding workshops with stakeholders and drafting amendments has proven to be challenging and additional time is needed before any amended ordinance is ready to be brought before the various committees and Board of County Commissioners; and

WHEREAS, the Board of County Commissioners wishes to maintain the status quo with respect to mining activity during the drafting process to ensure that the community's notice and traffic safety problems are addressed through new regulations rather than exacerbated during the time it takes to formulate any desired modifications to the excavating and mining ordinance; and

WHEREAS, the Board desires to extend the moratorium put in place on January 10, 2008, for an additional six months; and

WHEREAS, the Board of County Commissioners has considered any information provided by the Florida Department of Transportation regarding the effect this ordinance would have on the availability, transportation and potential extraction of construction aggregate materials on the local area, region and the state, as required by Florida Statute 337.0261,

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF INDIAN RIVER COUNTY, FLORIDA, that:

SECTION 1. PROHIBITION

No applications for mining administrative permit approvals shall be accepted or processed, and no mining permits shall be issued until January 10, 2009.

SECTION 2. EXEMPTIONS

The prohibitions of Section 1 above shall not apply to the following:

- A. Annual renewals of operating permits for existing approved mines, as of the effective date of this ordinance.
- B. All activities currently exempted by by Indian River County Code Section 934.04 "Exemptions".
- C. Existing operating mines involved in the completion of State Road 60 four-laning west of Interstate 95.
- D. Staff level administrative approvals for minor changes to existing operating mines, including but not limited to on-site moves of construction trailers.

This exemption D shall not include expansions to the acreage excavated nor the area of development of existing operating mines nor changes to approved haul routes.

SECTION 3. CONFLICTS

The application of any Indian River County ordinance in conflict herewith is hereby suspended during the time period set forth in Section 1 to the extent of such conflict.

SECTION 4. SEVERABILITY

If any section, sentence, clause, or phrase of this ordinance is held to be invalid or unconstitutional by any court of competent jurisdiction, then said holding shall in no way affect the validity of the remaining portions of this ordinance.

SECTION 5. EFFECTIVE DATE

This ordinance shall take effect upon filing with the Secretary of State.

SECTION 6. EXPIRATION DATE

This ordinance shall expire January 10, 2009, unless earlier terminated by ordinance.

This ordinance was advertised in the Vero Beach Press-Journal on the ___ day of _____, 2008, for a public hearing to be held on the ___ day of _____, 2008, and was advertised in the Vero Beach Press-Journal on the ___ day of _____, 2008 for a public hearing to be held on the ___ day of _____, 2008 at which time it was moved for adoption by Commissioner _____, seconded by Commissioner _____, and adopted by the following vote:

Sandra L. Bowden, Chairman	_____
Wesley S. Davis, Vice Chairman	_____
Commissioner Joseph E. Flescher	_____
Commissioner Gary C. Wheeler	_____
Commissioner Peter D. O'Bryan	_____

The Chairman thereupon declared the ordinance duly passed and adopted this ___ day of _____, 2008.

BOARD OF COUNTY COMMISSION
INDIAN RIVER COUNTY, FLORIDA

By: _____
Sandra L. Bowden, Chairman

ATTEST: Jeffrey K. Barton, Clerk

By: _____
Deputy Clerk

APPROVED AS TO FORM
AND LEGAL SUFFICIENCY

BY William G. Collins II
WILLIAM G. COLLINS II
COUNTY ATTORNEY

ORDINANCE NO. 2008-_____

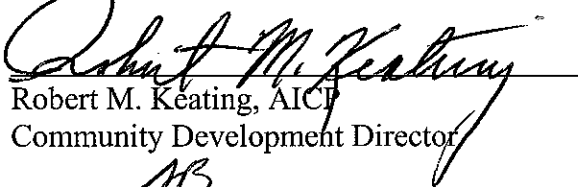
ACKNOWLEDGMENT by the Department of State of the State of Florida, this ____ day
of _____, 2008.


INDIAN RIVER COUNTY, FLORIDA

MEMORANDUM

TO: The Honorable Members of the Planning and Zoning Commission

DEPARTMENT HEAD CONCURRENCE:


Robert M. Keating, AICP
Community Development Director

FROM:  Stan Boling, AICP
Planning Director

DATE: May 15, 2008

SUBJECT: **Planning Information Package for the May 8, 2008 Planning and Zoning Commission Meeting**

For this meeting's packet, the following articles are provided:

- (1) "Recession? Not So Fast, Say Some", The Wall Street Journal, May 14, 2008, Kelly Evans and Justin Lahart.
- (2) "Slowly, the pace of home resales is picking up", Orlando Sentinel, May 13, 2008, Jerry W. Jackson.
- (3) "Biodiesel Plant in Low Gear", The Ledger, May 10, 2008, Kyle Kennedy.
- (4) "Ethanol: Is it worth it?", Daytona Beach news-Journal, May 15, 2008, Derek Catron.
- (5) "Scientists Are Starting to See Results in the Kissimmee's Restoration", The Ledger, May 9, 2008, Tom Palmer.
- (6) "Court lifts ban on rock mining in Dade", Miami Herald, May 10, 2008, Curtis Morgan.
- (7) ""Excerpts from 11th Circuit Court Ruling: Lakebelt Mining Case".

cc: Board of County Commissioners
Joe Baird
Michael Zito



May 14, 2008

PAGE ONE

Recession? Not So Fast, Say Some

Despite Pain, Economists Begin
Dialing Back Dire Forecasts

By **KELLY EVANS** and **JUSTIN LAHART**

May 14, 2008; Page A1

A funny thing happened to the economy on its way to recession: It's taken a detour.

That, at least, is the view of a growing number of economists -- including some who not long ago were saying a recession was all but inevitable. They note that stock and credit markets have steadily improved since the Federal Reserve intervened to keep Bear Stearns Cos. from bankruptcy in early March, while a series of economic reports have been stronger than expected.

CHANGING BAROMETER

- **The News:** Retail sales, excluding autos and parts, were surprisingly firm in April.
- **The Upshot:** Consumer spending and the U.S. economy continue to grow, suggesting recession is not a foregone conclusion.
- **The Risks:** It could be that the data will worsen in coming months, raising the risk of a shallow but lengthy recession.

Economists also cite swift policy responses, including a sharp reduction in interest rates by the Fed -- to 2% from 5.25% last September -- and the distribution of fiscal-stimulus checks to millions of Americans, as factors possibly easing the downturn.

"A couple months ago it seemed like we were on the abyss," said Jay Bryson, global economist with Wachovia Corp., referring to the seizing up of credit

markets and the collapse of Bear Stearns. "Things have changed....The numbers we've seen recently haven't been as bad as we were led to believe just a few months ago."

Wachovia now puts the odds of recession at 45%, down from 90% in April, and expects growth in gross domestic product of 0.6% at an annual rate in the first and second quarters of this year, followed by 1.2% growth in the third and fourth quarters. While he doesn't expect a recession, he says growth will be very weak through next year.

Indeed, plenty of economic warning signs remain, as reflected in plunging consumer confidence data and polls reflecting deep unease among voters. Rising prices for food and other commodities are prompting Americans to trim some spending and stoking concerns about inflation. The ongoing run-up in oil prices has pushed the average price of a gallon of gasoline to \$3.73 as of Tuesday, according to AAA, the automobile group. Home prices continue to decline and many economists expect that to depress spending in the months ahead.

Yesterday, Federal Reserve Chairman Ben Bernanke, while noting that market conditions have improved in recent months since the Fed's actions, also cautioned that they "are still far from

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normal." (Please see related article¹.)

REAL TIME ECONOMICS



2
 • Read the latest news and analysis on the economy at WSJ.com's Real Time Economics blog.³

Still, Mr. Bryson and other economists note that though two main pillars of the economy, the labor market and consumer spending, have faltered, they have not collapsed as they did in past recessions. On Tuesday, the Commerce Department said retail sales fell a slim 0.2% in April from the previous month -- a decline due mostly to a steep drop in auto sales. Excluding autos,

retail sales climbed 0.5%.

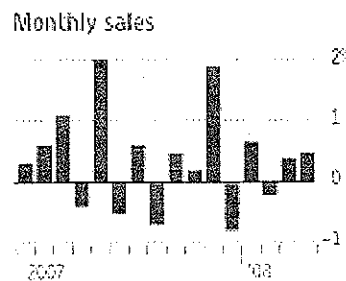
Job losses, meanwhile, have been less severe than they usually are in recessions. And many economists think the government's earliest estimate of first-quarter GDP growth -- 0.6% -- will be revised upward. After reviewing the retail-sales data, economists at Global Insight, a Waltham, Mass.-based forecasting firm, predicted the government would increase its assessment of GDP growth in the first quarter to 1% at an annual rate. They forecast continued growth in consumer spending, partly because of tax rebates and stimulus checks.

'Massive Policy Response'

In February, Global Insight joined Goldman Sachs, Morgan Stanley, UBS and Merrill Lynch in declaring the U.S. to be in recession. Now, Global Insight's Brian Bethune says that while the firm is still forecasting a recession, "it's conceivable we could avoid it," thanks to "the massive policy response we've seen" since he and others began warning about the risks facing the U.S. economy.

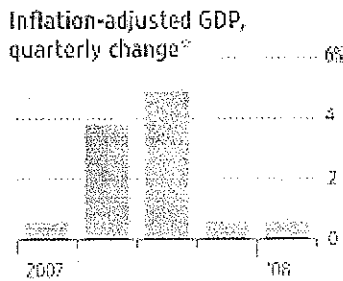
Still Ticking

Excluding motor vehicles and parts, retail sales rose in April ...



Source: Commerce Department

And the economy continued to grow in the last quarter.



*At a seasonally adjusted annual rate

Bruce Kasman, chief economist at J.P. Morgan, said while earlier this year it seemed like momentum was carrying the economy into a clear recession, there's only "a slightly better than even chance" of a recession now. "Even though there are meaningful drags from the credit crisis and energy costs, the economy is showing resiliency," he said.

The question remains open, since recessions typically aren't officially

diagnosed until some time after pain hits consumers. A common definition of a recession is at least two consecutive quarters of negative GDP. But the National Bureau of Economic Research -- the nonprofit group that is the official arbiter of when recessions begin and end -- defines a recession as a period of significant decline in economic activity across GDP, income, employment and retail sales that lasts more than a few months.

John Lonski, Moody's chief economist, said recent labor market data and signs the credit crunch is easing on Wall Street have made him less gloomy than he was a few months ago. In the latest WSJ.com survey of economists, conducted in May, he said the likelihood of a recession was 60% -- down from the 90% he predicted in the April survey.

"Recent evidence suggests there's a chance the economy might stabilize before this summer," he

said. On average, the 55 economists in the survey, conducted earlier this month, said the likelihood of a recession was 62.7%, down from 70%.

Claims for unemployment benefits -- which typically rise well above 400,000 a week during recessions -- have stayed well below that level, and fell last week. In addition, the economy isn't shedding hundreds of thousands of jobs a month, as it usually does in an economic contraction. In April, employers cut just 20,000 jobs, and the unemployment rate fell.

Even Alan Greenspan, who in early April said the U.S. was in the "throes of recession" and is going through the "most wrenching" crisis since World War II, has more recently toned down the warnings, saying the U.S. is in an "awfully pale recession." George Soros, who has long argued the U.S. is headed for a major crisis, also recently remarked that the "acute phase" of the crisis has now passed.

To be sure, even economists who are becoming more upbeat say the U.S. may be in for a period of protracted sluggish growth.

Prolonged Stagnation

"I think the problems are just starting," said Lehman Brothers economist Drew Matus, citing high gasoline prices and tightening lending standards, saying that prolonged stagnation can be worse than a recession.

Asked in an interview with The Wall Street Journal whether the U.S. could avoid a recession, Gary Stern, president of the Federal Reserve Bank of Minneapolis, said, "No," adding, "But there are recessions and then there are recessions....The average resident doesn't distinguish between whether the economy is growing half a percent or one and a half percent....It's more, how does this feel?"

The rise in commodity prices has hit import prices, which rose 1.8% in April from the previous month, after a revised 2.9% gain in March, the Labor Department said Tuesday. Compared to April 2007, import prices are up 15.4%, the largest annual rise since the data were first published in 1982. Even excluding petroleum, import prices rose 6.2% over the year, the highest since 1988.

With pump prices rising, Americans already have begun to reduce their fuel usage: Gas-station sales dropped 0.4% in April from the previous month.

--Greg Ip contributed to this article.

Write to Kelly Evans at kelly.evans@wsj.com⁴ and Justin Lahart at justin.lahart@wsj.com⁵

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orlandosentinel.com/business/orl-homes1308may13,0,7202040.story

OrlandoSentinel.com

Slowly, the pace of home resales is picking up

Jerry W. Jackson

Sentinel Staff Writer

May 13, 2008

Orlando's resale-home market showed a few more signs of improvement last month, though even the local Realtors group described the pace of change as glacial.

Unsold inventory fell and the number of pending contracts rose in April, both for a second month in a row. The number of homes sold in the Orlando Regional Realtor Association's core market, primarily Orange and Seminole counties, rose for a third straight month. And the year-over-year percentage drop in the Realtors' monthly existing-home sales shrank for a fourth consecutive month.

All are indicators, the trade group said, "of a continued, although admittedly glacially paced, shift toward a market coming into balance between buyers and sellers."

Another decline in the median sales price, while bad news for home sellers, meant properties were more affordable in April -- though the tightening of credit markets that started last summer has made it harder for many people to qualify for a mortgage.

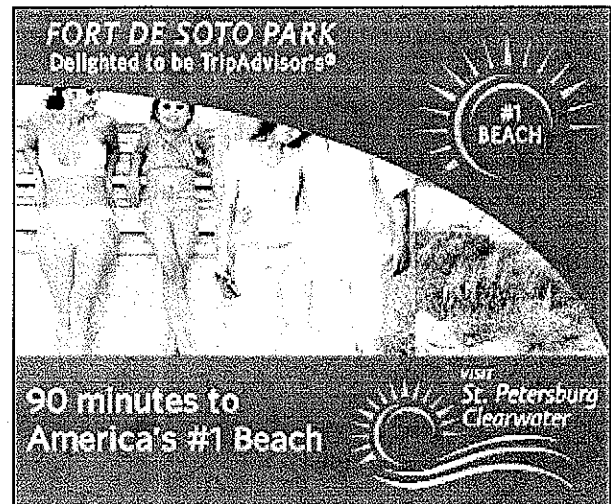
The current inventory translates into a 22.2-month supply at the current pace of sales. That's the eighth-biggest backlog on record, but it's also part of a steady improvement since the start of the year, which started with a 31.6-month supply in January, followed by 27.3 months in February and 22.7 months in March.

Akhtar Hussain, owner of the Village Coffee Pot on Donnelly Street in Mount Dora, thinks it's going to take "five to seven years" before the Central Florida real-estate market gets back to normal.

"They were building homes like crazy. So there's a surplus," the owner of the Mount Dora business noted. Now the slowing economy is adding to the region's housing woes.

Bill Loh, an aviation-industry consultant living in Oviedo, said some friends who recently moved back to Seminole County after a three- or four-year absence were "surprised that prices really haven't come down all that much."

Loh said he figures most people locally would probably do better to rent for another year, until prices



show they are stable and not still headed south.

"It's like when the stock market is going down -- no one wants to catch a falling knife," he said.

SALES UP FROM LAST MONTH

+2%

April sales compared with March

(1,147 vs. 1,120)

-25%

April sales compared with April 2007

(1,147 vs 1,530)

PRICES FALL

-4%

April median sales price compared with March (\$211,000 vs. \$220,000)

-13%

April median sales price compared with

April 2007 (\$211,000 vs. \$242,100)

For sellers, the decline in the median price

is more aggravating evidence that they missed the sweet spot to unload at the top.

INVENTORY TRIMMED

-36

April change in unsold inventory


compared with March (25,436 vs. 25,472)

+1,001

April change in inventory compared with April 2007 (25,436 vs. 24,435)

Jerry W. Jackson can be reached at jwjackson@orlandosentinel.com or 407-420-5721.

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Published: Saturday, May 10, 2008

lakeland facility

Biodiesel Plant In Low Gear

The rising cost of soybean oil makes profits unlikely as other countries increase their demand for the product.

By Kyle Kennedy
The Ledger

LAKELAND | Purada Processing is one of just two biodiesel plants in Florida, a cutting-edge facility that can run nonstop and produce 18 million gallons of the clean-burning alternative fuel each year.

But the Lakeland plant hasn't made a drop of biodiesel in months, despite strong demand, with officials saying they have been hobbled by the high price of oil - soybean oil, that is.

"The increase in the price of materials that it takes to produce biodiesel has made it economically unviable to produce biodiesel at a profit," said John Kellogg, spokesman for Boston-based World Energy Alternatives, which owns Purada. "Folks are waiting for the market to change."

Prices for soybean oil - the most common feedstock used in biodiesel production - have more than doubled in the past two years and prices for canola and palm oil also have been rising, Kellogg said.

Industry officials attribute the high cooking oil prices to demand from India and China, where consumer incomes - and diets - are improving with the countries' economic fortunes. Speculators also have been accused of manipulating the market.

Nevertheless, Kellogg said Purada halted all biodiesel production by the end of last year and has switched to refining high-grade glycerine, a byproduct of biodiesel used in making cosmetics, soap, shampoo and other products.

Purada's case is hardly unique.

Cooking oil prices "are affecting other producers, unfortunately," said National Biodiesel Board spokeswoman Amber Thurlo Pearson, who estimates about two dozen U.S. plants have halted production.

Last month, the Wall Street Journal reported that ingredients costs had stalled plans for new biodiesel plants in Southeast Asia; similar to Purada, Australian firm Natural Fuel Limited has switched from

biodiesel to glycerine production.

Kellogg said Purada was fortunate to already have the capacity to refine glycerine and is able to handle 10 million pounds of the substance per year. Still, World Energy had invested millions in the plant in recent years to ramp up biodiesel production and had to make staff cuts (Kellogg declined to cite specifics) to suit its current role.

While keeping an eye on soybean oil prices, Kellogg said officials are considering a switch to cooking grease, which also can be used to make biodiesel. Both he and Pearson are confident that biodiesel production will rebound in the U.S., especially because federal energy standards call for the nation to use 500 million gallons of the fuel in 2009 and ramp up to 1 billion gallons in 2012.

Domestic production of biodiesel was already at 500 million gallons last year, double the amount from 2006, according to the Biodiesel Board.

"Our plants are ready to go," Kellogg said. "If the markets line up right, we'll be ready to produce immediately."

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May 15, 2008

Ethanol: Is it worth it?

Everything you need to know

You've probably read about ethanol. How it would give a boost to American farmers, reduce our reliance on Middle East oil and slow global warming by cutting emissions of carbon dioxide.

Or was it how ethanol's to blame for jacking up world food prices, clear-cutting the rain forests and turning up the heat on global warming?

A little confused? Don't be. We've culled through mounds of (sometimes conflicting) news accounts and scientific reports to get the answers.

What is ethanol?

It's basically 180-proof grain alcohol. Your grandpappy might have called it "hooch" -- but don't drink it; it's been mixed with chemicals that could kill you. Mostly, it's been used as a fuel additive (check out the fine print on the pumps the next time you fill up). Some manufacturers are building cars that can run on gas or E85, a mix of 85 percent ethanol and 15 percent gasoline. Problem is E85 delivers about one-third fewer miles per gallon than gasoline, and it's tough to find. The service stations that carry it are mostly in the Midwest, because it's hard to transport ethanol in a pipeline and expensive (not to mention wasteful) to truck it far from the ethanol plants.

But isn't ethanol better than gasoline?

The scientists who first studied biofuels concluded they were more eco-friendly than gasoline. When you burn fossil fuels, you release into the atmosphere the carbon that's been locked away in them for eons. That's bad for global warming. The carbon in biofuels like ethanol comes from the atmosphere (taken in by growing plants), so in theory, you break even burning ethanol.

So what's the problem?

What works in the laboratory doesn't always hold true in the real world. If we were razing Wal-Marts and replacing them with cornfields to make ethanol, the environmentalists might still be on board. Instead, we're denuding forests in Brazil and Malaysia that once helped suck carbon from the Earth's atmosphere. Swapping rain forest for cropland is a bad deal for Mother Nature. New studies, like one published in "Science" magazine in February, take this into account and conclude that whatever gains are made by burning cleaner biofuels are overwhelmed by the negative effects of deforestation. It's not even close.

Why does producing ethanol increase my grocery bill?

Supply and demand. Instead of feeding poultry or livestock, about one-fourth of U.S. corn will be used in ethanol plants this year. That drives up the price, whether you're grilling a burger, making an omelet or drinking a soda that uses corn syrup. With an estimated 3 billion people living on the equivalent of less than \$2 a day, even slight increases to staples like corn can be devastating -- especially on top of droughts and increasing global food demand. Two University of Minnesota economists calculated that filling a 25-gallon gas tank of a sport utility vehicle with pure ethanol requires more than 450 pounds of corn -- enough calories to feed a person for a year. A food expert with the United Nations said in October that using good land to grow crops for fuel was a "crime against humanity."

What about reducing America's reliance on foreign oil?

It's a nice concept, but we're a long way off. If the United States hits its new goals of producing 36 billion gallons of ethanol by 2022, that would replace 1.5 million barrels of oil a day -- or less than 8 percent of America's daily oil consumption in 2006.

Are all types of ethanol the same?

Not even close. In Brazil -- where new cars are built to run on either gasoline or ethanol -- they use sugar cane to produce ethanol. Even after you consider all the fossil fuels used to fertilize, transport and refine the sugar, you get eight units of ethanol for every unit of fossil fuel it takes to produce. That's even better than gasoline's 5-to-1 energy ratio. Unfortunately, it's too cold to grow sugar cane in most of the United States, so we get our ethanol from corn, which needs lots of herbicides and fertilizers, can cause more soil erosion than most crops and needs to burn a lot of natural gas or coal to be distilled. Corn ethanol requires nearly as much energy as it produces.

Who benefits from ethanol?

It's been *really* good for farmers and big agricultural businesses. Corn prices are way up. And it's creating jobs in the Corn Belt, where ethanol plants are popping up like the dot-com startups that once dotted Silicon Valley. Ethanol also provided an easy way for presidential candidates to connect with would-be voters in the Midwest. All the leading candidates spoke of its virtues while campaigning in Iowa.


Is there no hope for clean alternatives to fossil fuels?

Scientists hope to find an efficient way to make biofuel from sources other than food -- things like prairie grasses, algae, organic waste, even garbage. But it's not cost-effective yet. And so long as the lobbyists have politicians focused on corn, it could be tough to make progress in other areas.

For example, the energy bill passed by Congress in December boosted requirements for ethanol production. Though the bill also called for the first major increase by Congress in required automobile fuel efficiency in 32 years and imposed new requirements to promote efficiency in appliances, lighting and buildings, tax incentives for solar and wind energy fell by the wayside. Democrats had wanted to pay for them by repealing tax breaks for oil companies. The president threatened to veto the bill if that provision was included.

--Compiled by Staff Writer Derek Catron

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River Revived

Scientists Are Starting to See Results in the Kissimmee's Restoration

By Tom Palmer
THE LEDGER

A reclusive marsh bird called an American bittern suddenly rises from its concealed location in the dense vegetation in the Kissimmee River floodplain.

A small flock of blue-winged teal, an anhinga and an American white pelican fly overhead.

Common moorhens call nearby.

Seven years ago this scene would have been unlikely, because what today is a marsh was a pasture.

That pasture had been created when the Kissimmee River was converted from a 103-mile winding natural river into a 56-mile drainage canal in the 1960s, draining 30,000 acres of marshes and destroying much of the aquatic food chain that once supported plentiful wildlife.

The fact that the work had wrecked the river's ecology was recognized as long ago as 1971, but it took nearly 20 years of lobbying, securing state and federal money, and undertaking the studies to launch what has been called the most ambitious environmental restoration project in history to begin to reverse the damage.

Restoration work on the \$620 million project finally began in 1999 and is scheduled to be finished in 2012.

Part of the project involves filling in portions of the old ditch so that water can refill the old, winding river channels, known as oxbows. Additionally, water managers bought land around lakes to the north of the river to raise their levels to store water to release into the river to try to make sure it continues to flow.

But even before the project is completed, scientists are starting to see some results.

In some parts of the marsh today, aerial surveys reveal congregations of more than 1,000 wading birds, said Mike Cheek, a biologist for the South Florida Water Management District.

"We've haven't had that in more than 30 years," he said.

Cheek said waterfowl are eight times more plentiful today than they were before the restoration project began.

Shorebirds were another long-missing component of the river's avian life.

They have gradually returned as sandbars have formed in restored portions of the river, providing places for this group of birds to forage.

"We expected 11 species," Cheek said. "We've observed eight of them, but not in great abundance."

He said they plan to supplement their aerial surveys of wading birds and waterfowl with studies along the river that will better document its use by secretive marsh birds such as rails and bitterns, and to survey along the river to find out how many resident and migrating songbirds use the restored habitat.

Cheek said he expects it will take time for wildlife to return because birds will need a while to rediscover the place that had been inhospitable for them for so many generations.

However, the water that the wildlife need is in demand elsewhere.

Utility officials from Orlando to Bartow have been looking toward the Kissimmee River as a potential future source of drinking water.

Officials are turning to the Kissimmee and other Florida rivers because water managers told them last year that after 2013 they may not be able to depend on increased withdrawals from the Floridan aquifer to supply the water for growth.

South Florida Water Management District spokesman Bill Graf said he's not sure there will be as much water available as people think, but said the studies to set the river's minimum flows haven't been completed.

"It seems foolhardy" to count on the river for drinking water, he said.

Lawrence Glenn, the restoration project manager, said they're looking toward getting a water reservation allocation for the river, which would mean the river and its wildlife are guaranteed a certain amount of water.

But Glenn acknowledged the ultimate decision will be made by his superiors.

There are also proposals to build reservoirs in the Kissimmee River Basin that water managers now dub the "Northern Everglades." Some of them will be diked impoundments, similar to clay-settling areas connected with phosphate mines. Glenn said those reservoirs would be located outside the floodplain marshes that are involved in the restoration.

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MiamiHerald.com

Posted on Sat, May. 10, 2008

Court lifts ban on rock mining in Dade

BY CURTIS MORGAN

A federal appeals court on Friday lifted a ban on rock mining in thousands of acres of Northwest Miami-Dade County, saying U.S. District Judge William Hoeveler let personal views color a "predetermined" decision to halt digging last July.

A three-judge panel in Atlanta, with one dissenter, ruled that Hoeveler improperly relied on his own analysis and opinions to dismiss studies and decisions by the Army Corps of Engineers, the federal agency charged with regulating the industry.

"No matter what the Corps concluded, and no matter what evidence supported that conclusion, the court would have banned mining because of its own conclusion that mining in the Lake Belt is a bad thing," Judge Joel Dubina wrote in the 11th Circuit Court of Appeals panel's majority opinion.

In July, the judge, citing "grave concerns" about health risks, ordered an indefinite halt to mining in a portion of the Lake Belt near the county's largest drinking-water wells.

The industry, the Corps of Engineers and county regulators call the water safe and Judge Hoeveler's concerns overblown.

The rock-mining industry, which says the 10-month curtailment cost South Florida thousands of jobs and drove up road- and home-building costs, called the ruling a major victory.

The decision lifted Hoeveler's ban on mining tracts owned by four companies -- White Rock Quarries South, APAC Florida, Vulcan Materials and Tarmac. It also reversed his 2006 ruling that the Corps had erred in 2001 in issuing permits for the industry to expand into 5,700 acres of wetland near the Everglades.

"This ruling is welcome news for Florida's economy," said Kerri Barsh, an attorney for several mining companies. "It advances transportation projects throughout the state and puts the environmental benefits of the Lake Belt Plan back on track."

But the decision clearly won't end years of legal battle over the Lake Belt, home to four of the state's five largest limestone mines and source of half the state's cement and fill.

The ruling said Hoeveler condemned Corps actions based on "simple disagreement" and had failed "to grant the Corps the proper level of deference" it argues is mandated under federal environmental laws.

But the panel issued no opinion on whether the Corps had complied with federal environmental laws in issuing the permits and it put the case back in Hoeveler's court, ordering him to reconsider that key question using "proper standards of review."

Paul Schwiep, an attorney representing three environmental groups who sued the Corps in 2002 over the mining permits, called the decision disappointing but based on narrow technical points could allow

Hoeveler "the discretion to reach the same result although on narrower grounds."

"The appeals court went out of its way to explain that it was not holding that Judge Hoeveler had erred on the merits of his ruling," Schwiep wrote in an e-mail.

The panel also rejected a request from miners to reassign the case to another judge

on grounds that Hoeveler was biased. In 2003, complaints of bias by the sugar industry led to Hoeveler's removal from a landmark case that forced Florida to reduce pollution flowing into the Everglades.

In the mining case, the Atlanta panel wrote, "We have no reason to believe that a well-respected district judge . . . will not be able to apply the proper standards of review."

In two lengthy rulings in 2006 and 2007, Hoeveler had blasted the Corps as a weak environmental watchdog, saying the federal agency had relied on old or industry-provided data to approve a mining expansion that could harm the Everglades, and endangered wading birds and drinking water. Citing a benzene plume and risks of bacterial contamination, the judge ordered mining halted in a zone near the Northwest Wellfield until the Corps completed a new environmental review. He allowed other mining to continue.

The industry, the Corps and county agencies have played down the concerns.

In September, the Corps completed a draft environmental study that again concluded excavation poses no significant environmental or health risk. The industry also argues its plan to "mine-out" another 15,000 to 18,500 acres over the next 50 years will provide environmental benefits because Everglades restoration plans call for abandoned rock pits to serve as reservoirs.

The court's majority opinion said Hoeveler too broadly interpreted the demands of some laws, such as the National Environmental Policy Act (NEPA), which the ruling said simply required federal agencies to follow a process.

"In this case, it would not violate NEPA if the [Corps environmental study] noted that granting the permits would result in the permanent, irreversible destruction of the entire Florida Everglades, but the Corps decided that economic benefits outweighed the negative environmental impacts."

In her dissent, Judge Phyllis Kravitch argued that Hoeveler's ruling and ban were justified under the Clean Water Act, which required the Corps to assess broader options for mining and to independently verify data. She noted that the Corps had largely parroted an industry study to support the need to mine the Lake Belt.

That report might be fair, she wrote, "But for all the Corps has explained in the record, it is a classic hired-gun expert report painted over with a thin veneer of rigor."

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-13297

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT May 9, 2008 THOMAS K. KAHN CLERK
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D. C. Docket No. 03-23427-CV-WMH

SIERRA CLUB,
NATURAL RESOURCES DEFENSE COUNCIL, INC.,
NATIONAL PARKS AND CONSERVATION ASSOCIATION,

Plaintiffs-Appellees,

UNITED TRANSPORTATION UNION,

Plaintiff,

versus

ROBERT B. FLOWERS,
Chief of Engineers, Army
Corps of Engineers, et al.,

Defendants-Appellees,

RINKER MATERIALS OF FLORIDA, INC.
MIAMI-DADE LIMESTONE PRODUCTS ASSOCIATION, INC., et al.,

Intervenor-Defendants-Appellants.

through the deferential lens of the APA.⁷ The judgment on the CWA-APA claim also is vacated.



IV. Conclusion

The district court seems to have predetermined the answer to the ultimate issue, concluding that the Corps should not permit mining in the Lake Belt, and analyzed the permitting process with that answer in mind. Indeed, the court made its predetermination of the ultimate issue explicit in its conclusion:

Regardless, however, of whether new studies may soon indicate that the Aquifer is not being harmed by the mining activities, or that the groundwater seepage effects can be minimized, or even if a more probing analysis reveals that there truly are no practicable and environmentally preferable alternatives to mining in this precious resource, the Court's conclusion would be unchanged.

DE 73 at 183. In other words, no matter what the Corps concluded, and no matter what evidence supported that conclusion, the court would have banned mining because of its own conclusion that mining in the Lake Belt is a bad thing. *Id.* at _____
decisions.

⁷ *E.g.*, DE 73 at 142 (reaching “opposite conclusion” based on “record evidence”); *id.* at 144 (criticizing Corps because “it appears that the Corps too quickly dismissed the alternative of ‘no mining’ in the Lake Belt”); *id.* at 148 (“Corps made several assumptions, and none are adequately explained in the ROD or elsewhere in the administrative record”); *id.* at 150 (rejecting Corps’s conclusion that no practicable alternatives for limestone exist and instead concluding that “[t]he administrative record clearly establishes that, indeed, there are other sources”); *id.* at 154 (“Corps made a clear error of judgment in the analysis of practicable alternatives under the CWA due, in part, to the agency’s reliance on a study that should have been independently verified.”); *id.* at 157 (disagreeing with Corps’s determination that the mining permits would not be contrary to the public interest); *id.* at 162 (holding Corps’s decision that public hearing was not required was an abuse of discretion).

184-85. The discretion to grant or deny CWA permits, however, is first given to federal agencies, not federal courts.

Again, we offer no opinion as to whether the Corps complied with NEPA or the CWA during the permitting process.⁸ We instead remand to the district court to answer those questions in the first instance, applying the proper standard of review.⁹ The APA-CWA judgment, the APA-NEPA judgment, and the Remedies Order are vacated, and the case is remanded for further proceedings consistent with this opinion.

VACATED and REMANDED.

⁸ Our disagreement with Judge Kravitch is exceedingly narrow. The district court's judgment is based on dozens of individual holdings, as is the injunction resting upon that judgment. Judge Kravitch suggests that by affirming a handful of individual holdings—holdings this opinion does not address—this Court can affirm the judgment and injunction in their entirety; we disagree. The district court itself noted that “[e]ven if one or two of the defects were not enough on their own to require remand of this matter [to the Corps], the cumulative effect of these irregularities makes it clear that further environmental analysis should have been conducted and a remand is necessary.” Summary Judgment Order at 184. Because the district court found many “irregularities” based on flawed analysis—a proposition with which Judge Kravitch agrees—the court did not properly know the “cumulative effect” when entering judgment and crafting a remedy. Rather than divining whether the district court would enter the same judgment and vast injunction given only a handful of its previous holdings, we think the better course is to vacate the judgment and remand for the district court to address the issues, applying the proper standard of review, in the first instance.

⁹ The Miners move to have the case reassigned on remand. We have no reason to believe that the well-respected district judge to whom this case is assigned will not be able to apply the proper standard of review on remand. Furthermore, one element of the decision whether to reassign a case on remand is “whether reassignment would entail waste and duplication out of proportion to gains realized from reassignment.” *United States v. Torkington*, 874 F.2d 1441, 1447 (11th Cir. 1989) (citing *United States v. White*, 846 F.2d 678, 696 (11th Cir. 1988)). On remand, reassignment would entail substantial waste and duplication because another judge would need to become familiar with the massive record.

impact on the endangered wood stork, (Claim III); an APA-ESA claim against FWS for concurring in the Corps's no impact determination, (Claim IV); and an APA-NEPA claim against the Corps, because the EIS failed to meet NEPA's requirements, (Claim V). After the district court granted summary judgment, but before the court issued the Remedies Order, the Corps and FWS undertook ESA formal consultation—the only relief Sierra Club requested for Claims III and IV. It was therefore improper for the district court to rely on those Claims' judgments in crafting a remedy; the claims were moot.³ Thus, the district court could rely only on its judgments on Claims I and V—APA-CWA and APA-NEPA judgments against the Corps—in issuing the injunction. We therefore review those judgments.



B. Standard of Review

The APA provides for judicial review of agency decisions like the Corps's decision to grant CWA permits to the Miners and the Corps's NEPA decisions during the permitting process. "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary,

³ This is not to say that any defendants are entitled to the extraordinary remedy of vacatur of the ESA judgments against the Corps and FWS, an issue we do not reach. Though, as the Miners point out, there is no "summary judgment exception" to mootness, there is a summary judgment exception to dismissal—a judgment must be vacated before underlying claims can be dismissed. *See generally U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 115 S. Ct. 386, 130 L. Ed. 2d 233 (1994).

capricious, an abuse of discretion, or otherwise not in accordance with law [or found to be] without observance of procedure required by law.” 5 U.S.C. § 706(2). “[T]his standard is exceedingly deferential.” *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996). The court’s role is to ensure that the agency came to a rational conclusion, “not to conduct its own investigation and substitute its own judgment for the administrative agency’s decision.” *Preserve Endangered Areas of Cobb’s History, Inc. (“PEACH”) v. U.S. Army Corps of Eng’rs*, 87 F.3d 1242, 1246 (11th Cir. 1996).

* C. NEPA

NEPA establishes procedures that a federal agency must follow before taking any action. The agency initially must determine whether the action to be taken constitutes a “major Federal action”—that is, an action “significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C); *see* 40 C.F.R. § 1508.18 (“Major reinforces but does not have a meaning independent of significantly. . .”). If the agency determines that a proposed activity is a “major Federal action,” the agency must discuss certain issues in a detailed statement—the EIS. *Id.* On the other hand, if the agency determines that a proposed activity is not a “major Federal action,” it must produce a “finding of no significant impact” (“FONSI”), a document “briefly presenting the reasons why an action . . . will not

have a significant effect on the human environment.” 40 C.F.R. §1508.13.

In some cases, after an agency publishes a FONSI or an EIS, but before any action is taken, the proposed action changes, or the agency receives additional information. In that situation, the agency must make an additional NEPA determination: the agency must determine whether the changes create, or the information reveals, significant effects on the quality of the human environment not previously considered. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374, 109 S. Ct. 1851, 1859, 104 L. Ed. 2d 377 (1989); *see also* 20 C.F.R. § 1502.9(c)(1). If new, significant effects are shown, the agency must prepare an SEIS. 20 C.F.R. § 1502.9(c)(1). When the change to the proposed action is a “minimizing measure,” however, the agency “is not automatically required to redo the entire environmental analysis.” *Sierra Club v. U.S. Army Corps of Eng’rs*, 295 F.3d 1209, 1221 (11th Cir. 2002). This is because a minimizing measure’s effects on the environment will usually fall within the scope of the original NEPA analysis. *See id.* (holding that road realignment to minimize environmental impact was within the scope of original EIS).

NEPA only requires that an agency follow this procedure; it does not mandate any particular result. “If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not

constrained by NEPA from deciding that other values outweigh the environmental costs.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S. Ct. 1835, 1846, 104 L. Ed. 2d 351 (1989). Moreover, an agency’s NEPA decisions are only reviewed under the APA’s highly deferential standard. *Id.*; *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 763, 124 S. Ct. 2204, 2213, 159 L. Ed. 2d 60 (2004); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 548, 98 S. Ct. 1197, 1214, 55 L. Ed. 2d 460 (1978).

Here, the Corps originally studied the propriety of issuing 50-year permits. Because the Corps found that issuing those permits would be a “major Federal action,” it prepared an EIS. AR 614. After severe criticism—specifically, objections regarding the possible contamination of the Northwest Wellfield and possible detrimental effect on the protected wood stork—the Corps adopted a minimizing measure: it reduced the permits’ duration to 10 years and limited the permits’ acreage. After adopting the minimizing measure and receiving the new information, the Corps issued a FONSI, AR 1028 at 113, best read as an addendum to the 50-year EIS, rejecting the notion that the new information and change in the project were such that an SEIS was required. Three NEPA issues were therefore before the district court: (1) whether the Corps’s determination that the 10-year permits would have no significant effect outside the scope of the original EIS was

arbitrary, capricious, or an abuse of discretion, AR 1028 (environmental assessment containing Corps's FONSI); (2) whether the Corps's determination that new information regarding contamination of the Northwest Wellfield and effects on the wood stork did not necessitate an SEIS was arbitrary, capricious, or an abuse of discretion, AR 1028; and (3) whether the 50-year permit EIS met NEPA's requirements, AR 614.

A court can only find a federal agency's attempted NEPA compliance inadequate where it is arbitrary, capricious, or an abuse of discretion in violation of the APA. *Vt. Yankee*, 435 U.S. at 548. This standard requires substantial deference to the agency, not only when reviewing decisions like what evidence to find credible and whether to issue a FONSI or EIS, but also when reviewing drafting decisions like how much discussion to include on each topic, and how much data is necessary to fully address each issue. The district court here frequently condemned Corps actions based on simple disagreement, rather than based on a finding that the actions violated the APA's deferential standard.⁴

⁴ *E.g.*, DE 73 at 65 (holding that groundwater contamination was not "studied adequately" and the Corps was without "sufficient data"); *id.* at 67 ("Corps should have recognized that it lacked essential information and . . . should have been more conservative as to [wellfield contamination] risks."); *id.* at 69 (holding that Corps reliance on technical reports "more than twenty years old" rendered its wellfield contamination discussion inadequate; "[e]ven a non-scientist recognizes that this poses a problem in the ever-changing world of South Florida's ecosystem"); *id.* at 70 (stating that "it was error for the Corps to have paid so little attention to [seepage]"); *id.* at 72 (holding Corps's discussion "far too vague to be in compliance with NEPA, and its open-endedness violates the requirement that permit conditions be

Moreover, NEPA is procedural, setting forth no substantive limits on agency decision-making. *Robertson*, 490 U.S. at 350. Simply put, whether the federal agency ends up taking the “major Federal action” at issue has nothing to do with NEPA compliance; NEPA only requires that the agency follow a certain process in deciding whether to take the action. *Id.* In this case, it would not violate NEPA if the EIS noted that granting the permits would result in the permanent, irreversible destruction of the entire Florida Everglades, but the Corps decided that economic benefits outweighed that negative environmental impact. That capricious decision might run afoul of a duty imposed by a different statute, but it would not violate any duty imposed by NEPA. *Cf. id.* at 350-51 (“[I]t would not have violated NEPA if the Forest Service, after complying with the Act’s procedural prerequisites, had decided that the benefits to be derived from downhill skiing at Sandy Butte justified the issuance of a special use permit, notwithstanding the loss of 15 percent, 50 percent, or even 100 percent of the mule deer herd. Other statutes may impose substantive environmental obligations on federal agencies, but NEPA

‘reasonably enforceable’—found in [a regulation unrelated to NEPA]”); *id.* at 90 (rejecting Corps’s interpretation of data and drawing different conclusions); *id.* at 91 (dismissing Corps’s mitigation conclusion because “it appears” not enough Pennsuco wetlands will be available for mitigation); *id.* at 92-93 (holding Corps failed to disclose sufficient information); *id.* at 100-01 (rejecting Corps’s finding that a “no action” alternative was not economically feasible); *id.* at 101 n.174 (making assumptions to support conclusions contrary to Corps’s conclusions); *id.* at 104 (criticizing discussion as “exceedingly brief”); *id.* at 112 (stating that “reliance by the Corps upon applicant-supplied reports . . . must be subjected to special scrutiny”).

merely prohibits uninformed—rather than unwise—agency action.” (footnote omitted)).

The district court’s NEPA analysis erroneously focuses on the Corps’s decision to take the major Federal action—granting the permits—and the adequacy of the mitigation measures on which the Corps conditioned the permits.⁵

Substantive issues like whether to grant the permits and what mitigation conditions to adopt are irrelevant to NEPA compliance. The following passage highlights the district court’s flawed belief that NEPA places substantive limits on federal action:

If these permits had been issued as fifty year permits, the Court would

⁵ *E.g.*, DE 73 at 69 (criticizing Corps’s decision to grant the permits, and the lack of protections placed as conditions); *id.* at 77 (“The Court is troubled by the underlying theme of the Corps’ ROD which suggests that the permits at issue have been designed to be extended to the full fifty year mining plan.”); *id.* at 78 (stating incorrectly that “Corps was required, by NEPA, to first attempt to avoid [EIS-discussed] impacts and then to minimize whatever was unavoidable, and, finally, to mitigate for any adverse affect”— substantive requirements); *id.* at 79 (stating incorrectly that “Mitigation . . . has been interpreted to require a replacement of the functional value of the wetlands, that is, there should be no net loss of wetland values”); *id.* at 90 (deciding that the “Corps’ decisions runs [sic] counter to the evidence”); *id.* at 91 (expressing concern about adequacy of Pennsuko mitigation plan); *id.* at 92 (“The record before the Court suggests that the Corps did not comply with NEPA in preparing the EIS, *nor in issuing the permits.*” (emphasis added)); *id.* at 95 (stating that “[i]f the wetlands are going to be destroyed, then mitigation for that loss is required”—a substantive requirement); *id.* at 96 (“[T]he Corps’ *permitting decision*—particularly the EIS—does not satisfy NEPA.” (emphasis added)); *id.* at 103 (“[T]he permits as issued . . . are not the environmentally preferable alternative Thus, the Corps’ decision was not in compliance with NEPA.”); *id.* at 104-05 (expressing dissatisfaction that the Corps intends to allow mining for full 50 years); *id.* at 109 (stating erroneously that “for purposes of the Corps’ NEPA analysis, environmental impacts are more important than economic ones, [sic] economic and social impacts have lesser importance than purely environmental or ecological impacts”); *id.* at 112-13 (“[Miners’ economic] losses cannot be justification for the possible, even probable, deleterious environmental effects caused by the mining.”); *id.* at 114 (speculating that takings litigation “created a costly specter . . . which may have spurred on the destruction of hundreds of acres of wetlands unnecessarily”).

have invalidated the permits and *directed the Corps to deny the permits* (rather than simply remanding the case for further study). *Such a conclusion would have been required under NEPA* (and the CWA) because of the significant adverse effects and the Corps' insufficient mitigation and other analyses.

DE 73 at 106 (emphasis added). NEPA can *never* provide grounds for a court to direct a federal agency's substantive decision.

We offer no opinion as to whether the Corps complied with NEPA during the permitting process. We must, however, vacate the district court's orders and remand for the NEPA issues to be decided by the district court in the first instance because the court failed to grant the Corps the proper level of deference and because the court failed to recognize NEPA's limited operation as a procedural, rather than substantive, command to federal agencies. On remand, the district court should address the issues with an eye toward the proper deferential APA standard and NEPA's limited, procedural scope.

D. CWA

The same pervasive lack of deference infects the district court's APA-CWA analysis.⁶ As with its NEPA analysis, the court failed to view the CWA claims

⁶ We reject the Miners' argument that the APA does not apply to the Corps's performance of its CWA duties and that, as a result, the United States has not waived sovereign immunity as to the Corps. In *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997), the Supreme Court rejected this argument in the ESA context, *id.* at 175, and the relevant statutory language in the ESA is almost identical to the analogous portion of the CWA. *Compare* 16 U.S.C. § 1540(g)(1) (ESA), *with* 33 U.S.C. § 1365(a) (CWA). Moreover, the United States persuasively argues in its amicus brief that the APA waives sovereign immunity for Corps CWA