

ENDANGERED SEA TURTLES PROTECTED
DURING CITY BEACH RESTORATION

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The 103rd Congress will consider reauthorization of the Endangered Species Act of 1973. In the 1992 presidential campaign, the Northern Spotted Owl controversy was oftentimes cited as an example of environmental extremism in which the Endangered Species Act favored animals over people. The media carried sound bites of inflammatory political rhetoric in which candidates predicted that the Endangered Species Act would leave the timber industry in the Pacific Northwest "up to its neck in owls, but no jobs."

Since the election, the ESA debate continues unabated in the press. In the popular media, the Endangered Species Act is usually portrayed as an either/or proposition in which species protection must come at the cost of development, both economic and recreational. Although costly and time-consuming, application of the ESA does not necessarily preclude economic or recreational development. On the contrary, as illustrated by the Boca Raton Sea Turtle case described below, a reasoned approach to development can not only be consistent with the ESA, but actually enhance the critical habitat of a threatened or endangered species.

WE CAN WORK IT OUT

In the case of *American Littoral Society v. Herndon*, 720 F.Supp. 942 (S.D.Fla. 1988), various environmental groups, including the Audubon Society and the Sierra Club, filed suit against the Army Corps of Engineers and the City of Boca Raton seeking to block a federal "dredge and fill" permit for a beach nourishment project on a portion of Boca Raton north beach. Specifically, the environmental groups contended that "the permit violates The Endangered Species Act because it requires construction during the months of June, July and August, the nesting season for two species of endangered sea turtles and one threatened species." In pertinent part, the facts of the case were as follows:

The City applied for a permit from the Corps under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act in December, 1984 and at the same time filed a permit application with the Florida Department of Environmental Regulations (DER) pursuant to state requirements. DER approved the permit in November of 1986 authorizing the construction of a beach 100 to 125 feet wide along a 1.45 mile stretch with 980,000 yards of sand dredged from a "borrow" area located approximately 2500 feet offshore.

In October, 1987, the U.S. Fish & Wildlife Service (FWS) issued its biological opinion with several reasonable and prudent measures, which must be implemented or the incidental take of the sea turtles "is not authorized". [Disruption of sea turtle nesting

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would constitute an incidental taking of an endangered species in violation of the ESA.] As measure # 1: "beach nourishment should be conducted before May 30th or after October 5th (preferably before May 1st or after October 31st)."

The conclusion of the statement of findings of the Corps was that "the issuance of the permit [for the project] is not contrary to public interest". Further meetings were held between the Corps of Engineers and FWS in an effort to avoid any encroachment of the project with sea turtle nesting and if that was unavoidable, to expand nest protection efforts to insure earliest relocation of nests in order to achieve maximum hatching success. In December of 1987, the City's former "self-releasing hatchery" was lost due to erosion of the beach.

The issue before the federal district court was, therefore, "whether, under the permit, the disturbance of the sea turtle nesting during the months of June, July and August violates the Endangered Species Act." Based upon the following evidence, the federal district court found "the City's track record, statistically supported, of relocation of sea turtle nests in the past" indicated its willingness to comply with the ESA.

The beach nourishment project covered by the permit in the instant case is for 1.45 miles of the City's 5 + mile-long beach. Boca Raton has maintained an 11-year survey of its sea turtle nesting and the following statistics apply to the three sea turtle species involved: the loggerhead, the green and the leatherback. An average of 333 loggerhead sea turtles have nested in the area annually while during the 11 year monitoring period an average of only 2.3 leatherback and 8.7 green sea turtles nested on the beach each year.

The Boca Raton Sea Turtle Conservation Program was initiated in 1977 and the City's Chief Environmental Officer, Richard Wolf, has supervised it since that time. His extensive background and duties are set forth in his Affidavit and the steps taken by the City to implement its turtle protection program are set forth in great detail. For example, there are 15 persons properly trained and included under Florida Department of Natural Resources permit participating in the Sea Turtle Protection Program. The monitoring, locating and, if necessary, removing of nests is described in detail in the Affidavit.

The City of Boca Raton Sea Turtle Preservation Program has received both state and national recognition. For example, the Center for Environmental Education in Washington, D.C. has used the City's program as a model for other communities wishing to start their own sea turtle conservation programs. Boca Raton sea turtle conservation program has received recognition in Defenders of Wildlife Magazine. The Florida Department of Natural Resources has stated that Boca Raton has one of the best sea turtle protection programs in the State of Florida and has used the City's program as a model for other Florida cities.

Further, the court found that "the erosion problem claimed by the City of Boca Raton to exist is real"

and that continuing beach erosion posed a threat to the sea turtle population.

The city statistics on sea turtle nests in the north beach area strongly corroborate the court's finding, as in recent years the City has relocated, necessarily, sea turtle nests that were threatened by tidal activity. Wave action poses two problems to sea turtle nests: the washing of the nests out to sea or inundation of them, thereby "drowning" or greatly increasing the mortality rate of the eggs. Because of the erosion of the beaches in the north beach area, more and more sea turtle nests each year have been laid below the mean high water line, requiring more and more nests to be relocated. For example, in 1985 106 sea turtle nests were destroyed by storm activity and erosion of the 314 nests (34%) deposited on Boca's north public beaches. During 1986 on the same beaches, 185 of the 327 nests (57%) were relocated to provide greater protection.

These figures contrast with the fact that 70% of the nests laid in 1987 at the north Boca beaches had to be relocated because of locations threatened by wave activity or tidal inundation. This pattern predicts even higher relocation percentages for relocation if the beach is not restored quickly.

There has been a census made of turtle nesting this spring and as of May 15, 1988, there have been 15 loggerhead nests and one leatherback nest laid on the north 2.6 miles of the City's public beaches. Of those 16 nests, a total of 7 have been laid in the 1.45 mile project area; all of these nests had to be relocated to the hatchery because they were threatened by destruction due to wave activity or tidal inundation.

The City's hatch rate from relocated sea turtle nests has been highly successful over the years. For example, the successful hatching rate in 1987 was 78.3% for all relocated loggerhead eggs compared to the 78.6% survival percentage of hatchlings for nests left in their natural location on the beach. The court finds this reassuring because it indicates that the City's protected hatchery and relocation procedures are being carried out with skill and attention to detail.

In light of "Boca's background, experience and data regarding sea turtle hatching and survival on its beach," the federal district court considered whether "the reasonable and prudent measures imposed by FWS on the City as to the instant permit" were in compliance with the Endangered Species Act. As noted by the court the U.S. Fish and Wildlife Service, Department of Interior "has been delegated the responsibility of monitoring compliance with the Endangered Species Act. Section 7(a)(2) of E.S.A. (16 U.S.C. § 1536(a)(2)).

In this particular instance, the court found that the "reasonable and prudent measure set forth by the FWS in its biological opinion" stipulated that the "incidental take is not authorized if the following reasonable and prudent measures are not implemented" Specifically, FWS biological opinion stated that ESA compliance required the following:

To minimize the need for nest relocation and therefore reduce the possibility of nest

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burial or crushing of missed nests, beach nourishment should be conducted before May 30 or after October 5 (preferably before May 1 or after October 31)"

The City agreed to comply "with all the requirements set forth in the biological opinion of FWS and indicated to FWS its item by item analysis of the actions already taken by the City and the operations plan to comply with FWS's requirements." In light of the City's expressed willingness to comply with FWS such requirements, FWS found that "the City has acted in good faith to address all sea turtle conservation measures." Accordingly, FWS qualified its opinion to allow beach restoration during the nesting season subject to the following conditions:

Although a lawsuit has been filed, I am still hopeful any litigation can be resolved quickly and the project completed before June 1. However, in the event litigation, weather, or equipment breakdowns require activity to continue into June, it will be necessary to implement an alternative procedure to minimize the impact on nesting turtles. The Service recommends that, if it becomes necessary to conduct nourishment activities after June 1, 1988, hourly nighttime beach patrols during the entire nesting season be implemented. Hourly nighttime surveys and nest relocation to the secure hatchery will virtually ensure no nests are missed and therefore avoid any incidental take due to nest burial from nourishment material or crushing by heavy equipment. This will also enhance hatching success.

If nourishment activities are necessary beyond June 1, 1988, and the City implements the above stated alternative, you will be in compliance with the Endangered Species Act... [T]his recommendation is consistent with a Service-Corps of Engineers agreement which attempts to minimize adverse impacts and maximize the benefits of beach nourishment for sea turtles.

In response, the City agreed "to provide the hourly nighttime beach patrols and nest relocation throughout the construction phase of the project if nourishment activities extend or begin after June 1, 1988."

The plaintiff environmental groups argued that the FWS could not alter its original biological opinion in this manner. The federal district court, however, found that "the modification [of the biological opinion] by FWS in this fashion" was minor and, therefore, authorized and consistent with the following regulations implementing ESA requirements for inter-agency cooperation.

Under 50 C.F.R. § 402.14(i) describing incidental take, it is clearly set forth "reasonable and prudent measures, along with the terms and conditions that implement them cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes."

Further, in FWS's own language in its promulgation of its regulations is 1986 it stated: "Reasonable and prudent measures were intended to minimize the level of incidental taking, but Congress also intended that the action go forward essentially as planned.

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Therefore, the Service believes that they should be minor changes that do not alter the basic design, location, duration, or timing of the action."

A preamble to the regulations implementing ESA sets forth that the permit applicant plays an active role in the consultation process and that FWS remains available to discuss a biological opinion with the permittee on an informal basis.

Within the scope of the spirit and rules of the Regulations, FWS and the Corps had been cooperating. This inter-agency cooperation is reflected clearly in FWS's letter of December 22, 1987 to the District Engineer of the Corps of Engineers in which FWS states that "if possible, every effort would be made to plan beach nourishment projects requiring offshore or other sources of fill for early May, or sooner, in an attempt to avoid intrusion into the peak of the nesting season on high density nesting beaches [includes Palm Beach County]. Where these projects, in spite of the aforementioned precautions, extend unavoidably into the nesting season, nest protection efforts will be expanded to insure that the maximum number of nests are found and relocated as early after deposition as possible to maximize hatching success."

As a result, the federal district court found that "compliance by the City, whether already completed or as promised, will satisfy the requirements and limitations set forth by the U.S. Fish and Wildlife Service" and satisfy the requirements of the Endangered Species Act.

With the City's track record, statistically supported, of relocation of sea turtle nests in the past and with the addition of the FWS requirement of hourly nighttime beach patrols agreed to by the City, the court finds that the limitations imposed by FWS will have been met...

As noted by the federal district court, "Boca Raton north beach nourishment restoration project has been reviewed thoroughly-- not just by federal agencies, but by state agencies as well." Further, the court acknowledged that "[e]ach of them has approved the project, there were some relatively few concerns of some of the agencies at some point in time, but those have been fully addressed and dispelled."

At the time of the hearing in the instant case the City had received permits for this project from the Florida Department of Environmental Regulations (DER), the Florida Department of Natural Resources (DNR), the United States Army Corps of Engineers (Corps); additionally, it had received funding from the Florida legislature and the Governor. The project has been the subject of two administrative proceedings at the state level, two full rounds of notice comment proceedings, which included public hearings, at the federal level. The Environmental Impact Statement of the Corps has been detailed and well documented and it has been reviewed, pursuant to various regulatory procedures, by several other federal agencies, including the United States Fish & Wildlife Service (FWS) and the United States Environmental Protection Agency (EPA).

Without counting the pages, but only estimating, the record in this case is extensive and must number in the thousands of pages at this point in time. The matter has not come to this court with an absence of tracks on the trail. Instead, they are many.

Plaintiffs in this case bear the strong burden of showing before a preliminary injunction would lie in their favor that (1) a substantial likelihood that Plaintiff would prevail on the merits, (2) a substantial threat that Plaintiffs will suffer irreparable injury if the injunction is not granted (3) that the threatened injury to Plaintiffs outweighs the threatened harm the injunction may do to Defendant and (4) that granting the preliminary injunction would not disserve the public interest. In fact, the pattern of beach erosion as well as the resulting higher percentage of relocated turtle nests annually indicates any delay would disserve the public interest.

The preliminary injunction is an extraordinary and drastic remedy and granting it is the exception rather than the rule. Plaintiffs must clearly carry the burden of persuasion. Alas for Plaintiffs. Not only have they failed to carry all four prerequisites in order for preliminary injunction to issue, but this court finds that they have failed to carry any of them.

The federal district court, therefore, denied the request for an injunction to block the issuance of a federal permit for the City's beach restoration project.