

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

WILDLIFE CONSERVATION FUND OF
AMERICA, EVERGLADES PROTECTION
SOCIETY, INC., COLLIER SPORTSMEN AND
CONSERVATION CLUB, BARBARA JEAN
POWELL, DAVID VATTER, ROGER NEWTON,
and LYLE McCANDLESS,

Plaintiffs,

vs.

Case No. 2:01-cv-25-FtM-29DNF

GALE NORTON, Secretary, Department
of Interior, JOSEPH DODDRIDGE,
Acting Assistant Secretary of
Interior, DENNIS GALVIN, Acting
Director, National Park Service,
JERRY BELSEN, Regional Director,
National Park Service, and JOHN J.
DONAHUE, Superintendent, Big Cypress
National Preserve,

Defendants,

FLORIDA BIODIVERSITY PROJECT,
AMERICAN LANDS, BIODIVERSITY LEGAL
FOUNDATION, BLUEWATER NETWORK,
DEFENDERS OF WILDLIFE, FUND FOR
ANIMALS, HUMANE SOCIETY OF THE
UNITED STATES, NATIONAL PARKS
CONSERVATION ASSOCIATION, SIERRA
CLUB, WILDLANDS CENTER FOR
PREVENTING ROADS, WILDERNESS
SOCIETY, BRIAN SCHERF, and ROSALYN
SCHERF,

Intervening-defendants.

OPINION AND ORDER

_____In this civil action, plaintiffs allege that defendants failed
to comply with the National Environmental Policy Act when they

promulgated the Final Recreational Off-Road Vehicle Management Plan for Big Cypress National Preserve Supplemental Environmental Impact Statement. All parties filed cross motions for summary judgment, and the matter is now before the Court for consideration of the Report and Recommendation (Doc. #104) filed by Magistrate Judge Douglas N. Frazier. Judge Frazier recommends that the Court deny plaintiff's Motion for Judgment (Doc. #61), grant Intervenor's Motion for Entry of Judgment (Doc. #71), and grant defendant's Motion for Entry of Judgment (Doc. #74). Plaintiffs filed Objections (Doc. #110) to the Report and Recommendation, and both defendant-intervenors and defendants filed Responses (Docs. #112, 113) to the Objections. For the reasons set forth below, with one exception, the Court accepts and adopts the Report and Recommendation.

I.

After conducting a careful and complete review of the findings and recommendations, a district judge may accept, reject or modify the magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1); Williams v. Wainwright, 681 F.2d 732 (11th Cir. 1982), cert. denied, 459 U.S. 1112 (1983). A district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). This requires that the district judge "give fresh consideration to those issues to which

specific objection has been made by a party." Jeffrey S. by Ernest S. v. State Bd. Of Educ. Of Georgia, 896 F.2d 507, 512 (11th Cir. 1990) (quoting H.R. Rep. NO. 94-1609, reprinted in 1976 U.S.C.C.A.N. 6162, 6163). A district judge reviews legal conclusions de novo, even in the absence of an objection. See Cooper-Houston v. Southern Ry. Co., 37 F.3d 603, 604 (11th Cir. 1994). In this case, the Court applies the same standards of review as did the magistrate judge (with one exception noted below).

II.

Plaintiffs brought suit pursuant to the Administrative Procedure Act, which permits a federal court to set aside agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); Wilderness Watch & Public Employees for Env'tl. Responsibility v. Mainella, 375 F.3d 1085, 1088 (11th Cir. 2004). Under the arbitrary and capricious standard, a reviewing court "gives deference to the agency decision by reviewing for clear error, and by refraining from substituting its own judgment for that of the agency. However, the court must also look beyond the scope of the decision itself to the relevant factors that the agency considered. Its duty is to ensure that the agency took a 'hard look' at the environmental consequences of the proposed action." Sierra Club v. U.S. Army Corps of Eng'rs, 295 F.3d 1209, 1216 (11th Cir. 2002) (citations omitted).

Plaintiffs allege that defendants failed to comply with the National Environmental Policy Act (NEPA) when they promulgated the Final Recreational Off-Road Vehicle Management Plan for Big Cypress National Preserve Supplemental Environmental Impact Statement (the Final SEIS). NEPA mandates that federal agencies consider the environmental impact, and potential alternatives, for every proposed major Federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). "NEPA essentially forces federal agencies to document the potential environmental impacts of significant decisions before they are made, thereby ensuring that environmental issues are considered by the agency and that important information is made available to the larger audience that may help to make the decision or will be affected by it." Wilderness Watch and Public Employees for Env'tl. Responsibility, 375 F.3d at 1094.

NEPA "is not a substantive environmental statute which dictates a particular outcome if certain consequences exist. Instead, NEPA creates a particular bureaucratic decisionmaking process." Sierra Club v. U.S. Army Corps of Eng'rs, 295 F.3d at 1214 (citation and quotation omitted). An agency must take a "hard look" at the environmental consequences of proposed action. This requires the agency to "examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." Sierra

Club, 295 F.3d at 1216 (citation and quotation omitted). A court may overturn an agency's decision as arbitrary and capricious "if it suffers from one of the following: (1) the decision does not rely on the factors that Congress intended the agency to consider; (2) the agency failed entirely to consider an important aspect of the problem; (3) the agency offers an explanation which runs counter to the evidence; or (4) the decision is so implausible that it cannot be the result of differing viewpoints or the result of agency expertise." Sierra Club, 295 F.3d at 1216 (citation omitted). "[S]o long as an agency has taken a 'hard look' at the environmental consequences, a reviewing court may not impose its preferred outcome on the agency." Wilderness Watch and Public Employees for Environmental Responsibility, 375 F.3d at 1094.

The Court does not agree with one aspect of the Report and Recommendation's discussion of the standard of review. The Court is not convinced that action which purportedly has a beneficial impact on the environment is subject to less stringent interpretation under the NEPA than is otherwise required. (Doc. #104, pp. 14, 26). While Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1120 (9th Cir. 2002) does say that, no Eleventh Circuit case has so held, and the basis for such a holding is not apparent in the statute.

III.

After independently reviewing the voluminous record in this case, as well as the various legal memoranda, the Court concludes that the agency took the required "hard look" at the proposed action and its consequences by examining a reasonable range of viable alternatives. Contrary to plaintiffs' argument, more than two alternatives were examined. The 1991 General Management Plan and Final Environmental Impact Statement (GMP/FEIS) analyzed four alternatives. In 1992 the National Park Service adopted a modified version of one of these alternatives. Pursuant to a 1995 Settlement Agreement of a lawsuit, in 1999 the National Park Service issued a draft Off-Road Vehicle Management Plan and SEIS Draft which considered but rejected a status quo alternative and two alternatives from the 1991 GMP/FEIS and considered extensively two additional alternatives. The 2000 Final ORV Plan and SEIS discussed and rejected the three alternatives not adopted in the GMP/FEIS, as well as the "status quo" and "no action" alternatives. This 2000 Final Plan adopted a modified version of the "proposed action" alternative. After public comment, the Record of Decision for the Final Plan was issued. It is clear from the record that at least five alternatives were examined and considered in this case, as the Report and Recommendation notes. (Doc. #104, pp. 7-12). While the Report and Recommendation cited cases where as few as two alternatives were found sufficient (Doc. #104, pp. 14-15), it did

not find that the agency only examined two alternatives in this case. The Court also agrees with the Report and Recommendation that "tiering" was appropriate under the circumstances of this case. E.g., Sierra Club, 295 F.3d at 1215. Additionally, the Court finds that the 2000 Final Plan was not so different from its predecessor that public comment was unavailable to plaintiffs. As the Report and Recommendation recites (Doc. #104, pp. 11-12), a significant number of public comments were made on the Final Plan, even though plaintiffs did not comment during the designated time period.

While plaintiffs argue otherwise, the Report and Recommendation did not conclude that plaintiffs were barred from challenging the adequacy of alternatives because they did not themselves offer an alternative for agency consideration. Rather, Judge Frazier noted the absence of any specific proposed alternative from plaintiffs, and stated that plaintiffs should have offered an alternative if they wanted the agency to address it among the other alternatives developed by the agency. (Doc. #104, pp. 16-17). This is clearly correct.

The Court finds that the Final Recreational Off-Road Vehicle Management Plan for Big Cypress National Preserve Supplemental Environmental Impact Statement was not arbitrary or capricious, was not an abuse of discretion, and was not otherwise contrary to law.

The Final Plan suffers from none of the defects which would justify the Court's rejection.

Accordingly, it is now

ORDERED:

1. The Court accepts and adopts the Report and Recommendation (Doc. #104) with the exception that the Court has declined to give the actions in this case less stringent review because they were purportedly beneficial to the environment.

2. Plaintiffs' Motion for Judgment (Doc. #61) is **DENIED**.

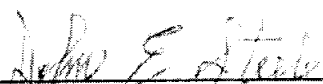
3. Intervenors' Motion for Entry of Judgment (Doc. #71) is **GRANTED**.

4. Defendants' Memorandum of Law on the Merits of Plaintiffs' Claim, construed as a Motion for Entry of Judgment (Doc. #74), is **GRANTED**.

5. The Clerk of the Court is directed to enter judgment in favor of defendants and intervening defendants and against plaintiffs, finding that the Final Recreational Off-Road Vehicle Management Plan for Big Cypress National Preserve Supplemental Environmental Impact Statement was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

6. The Clerk of the Court shall terminate any remaining deadlines and motions, and close the file.

DONE AND ORDERED at Fort Myers, Florida, this 22nd day of February, 2005.


JOHN E. STEELE
United States District Judge

Copies:
U.S. Magistrate Judge
Counsel of Record