Water Law Review

Volume 10 | Issue 2 Article 27

1-1-2007

Sierra Club v. U.S. Army Corps of Eng'rs, 464 F. Supp. 2d 1171 (M.D. Fla. 2006)

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The court denied Donovan's motion for summary judgment, his petition for injunctive relief, and his claim for damages for the taking of his private property without just compensation.

Jacob J. Schlesinger

Sierra Club v. U.S. Army Corps of Eng'rs, 464 F. Supp. 2d 1171 (M.D. Fla. 2006) (holding that the United States Army Corps of Engineers' issuance of a general permit for a development project encompassing 48,150 acres of wetlands in the Florida panhandle, though extraordinary, did not go beyond the scope of Corps' authority and correctly followed all necessary Clean Water Act, National Environmental Policy Act, and United States Environmental Protection Agency standards).

During the Spring of 2005, the Sierra Club and the Natural Resources Defense Council filed suit against the United States Corps of Engineers ("Corps") in the United States District Court for the Middle District of Florida on six grounds: (1) that the extensive amount of land covered in the general permit was beyond the scope of the Clean Water Act's ("CWA") general permitting scheme; (2) that the authorized activities were not "similar in nature"; (3) that the permit would cause more than minimal adverse impacts and that the Corps had not calculated those impacts properly; (4) that the Corps had not followed the United States Environmental Protection Agency's ("EPA") standards for applying the CWA; (5) that the Corps had not taken a "hard look" at the project under the National Environmental Policy Act ("NEPA"); and (6) that the Corps erroneously issued a Finding of No Significant Impact ("FONSI") after completion of its Environmental Assessment ("EA"). In August 2005, the Sierra Club filed a motion for preliminary injunction which the court granted on restricted grounds, halting one of five projects already approved under the general permit, and placed a moratorium on further authorizations until it resolved the instant case.

In 2000, the Corps noticed a rising number of permit applications from St. Joe Company, Inc. ("St. Joe") to dredge and fill wetlands in the Florida Panhandle. St. Joe traditionally raised pine trees in its wetlands, but the company expressed its desire to commercially and residentially develop its land. In response, the Corps sought to develop a large-scale plan for the region and entered negotiations with the company. In June 2004, the Corps granted a general permit that controlled development of 48,150 acres, or seventy-five square miles. Unlike individual project permits, the Corp may issue a general permit on a regional level, which allows dredging and filling for an "entire category of activities, provided that the activities are similar in nature and will cause only minimal adverse environmental effects, both separately and cumulatively." After the Corps issues a general permit,

landowners need only "authorization" from the Corps to dredge and fill, making the process "far less onerous." The Corps may place additional terms on any project.

The Corps' permit limited impacts to high-quality wetlands on 125 acres, and limited impacts on low-quality wetlands to twenty percent in any one of nineteen sub-basins identified by the Corps. St. Joe owns more than seventy-five percent of the acreage included in the permit. St. Joe promised 13,200 acres of conservation easements to the Florida Department of Environmental Protection ("DEP"), as well as entered into a thirty-page Ecosystem Management Agreement ("EMA") with DEP that the Corps included in the NWP general permit.

In their first argument, the Sierra Club stated that the scope of the permit "obliterated" the distinction between individual and general permits, and thereby ignored the policy reasons for having the two categories. The Corps usually issued general permits for projects like building utility lines. However, this permit granted a range, from construction of hospitals to golf courses. The Sierra Club further argued that landowners escaped the important and detailed review of individual permits for these widely varied projects, and "bought" the Corps' deference with the promise to conserve so much acreage.

The Corps countered that without a "holistic" view of this vast amount of uniform acreage, a piecemeal approach to permitting could result in greater harm, and validated its discretion under agency privilege. The court held it could not rule on whether the permit was "unprecedented" in size, but only if the Corps followed the proper procedures. The court held that Congressional intent for the general permit was, in fact, to reduce paperwork and free the Corps from reviewing every dredge project in a region. Additionally, "the novelty or scope of a general permit's proposed usage does not alone create grounds for the Court to find it to be outside the law."

Second, the Sierra Club argued that the authorized activities for development were not similar in nature and that the Corps acted "arbitrarily or capriciously." As explained above, the Sierra Club envisioned varied projects under the Corps category of "suburban development." The Sierra Club argued that the language of the general permit under the CWA was not ambiguous, and that the CWA does not allow this broad range of projects under "similar in nature." However, even if the language is ambiguous, it argued that the Corps should not be allowed the deference under the *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, standard, but instead must prove a "power to persuade" under *Skidmore v. Swift & Co.*, depending on "thoroughness, logic, and expertness," as determined in *United States v. Mead Corp.*

The court held the language ambiguous. The Corps argued that because it had limited the width of roads in the area, the developer could only develop the area for suburban use as opposed to other sorts of development. The court performed a statutory interpretation test

because the "similar in nature" language created either narrow or broad categories. Without clear legislative intent, the court followed the *Chevron* test and read the Corps own regulations. The court held the Corps' regulations "impermissibly" overstepped its bounds, and so finally the court followed the "power to persuade" test. The court held the Corps had correctly interpreted the "similar in nature" language by holding a four-year discussion with landowners, government agencies and the public in the area, by restricting road widths, and because Congress let the Secretary interpret the language by not including a definition, the court was convinced, "although this is admittedly an extremely close call."

Third, the Sierra Club claimed that the Corps violated the CWA because the permit allowed more than "minimal adverse environmental impacts." The Sierra Club brought three arguments: (1) the impacts would not be "minimal" *per se*; (2) the Corps would not rely on future projects of mitigation to net impacts; and (3) the Corps lacked scientific support.

While neither the CWA nor the Corps' regulations defined what "minimal" meant, a decision in the Fourth Circuit convinced the court to allow the earlier preliminary injunction because "the actual projects to be authorized . . . were unknown . . . the Corps could not assess what impacts of any projects would be in advance of the permit's issuance." The Fourth Circuit vacated that ruling before the instant case began, and so the court looked anew at the issue.

The Sierra Club argued that because development would destroy at least 1500 acres of wetlands, and the Corps has a stated goal of "no net loss" of wetlands, the impacts can not be "minimal" *per se*. The court used the "power to persuade" test to determine the meaning of "minimal," allowing the Corps to make its argument for interpretation. The court held that the statute did not require the Corps to make a "pre-project" acreage determination. It also held that, as the majority landowner, St. Joe was bound to the DEP by the permit; that the general permit served as a backdrop to guide development in the region; and conservation easements would be in place. However, after calculations, the court held that the Corps had relied on future mitigation projects and condition to arrive at its "minimal" impact assessment. Therefore, the court turned to the Sierra Club's second argument regarding "minimal:" that the Corps improperly relied on those post-permit measures.

The Corps' interpretation of "minimal adverse environmental effects" was "net effects." The agency argued that the special conditions within the permit supplied their basis for calculating "net effects." Those conditions included stormwater treatment requirements, specific guidelines for fill material, buffers between pristine areas and development, the caps on high and low-quality wetland impacts, and that the Corps could add additional terms needed to "minimize adverse

effects." With future mitigation measures included, the Corps found an actual net increase in wetlands because of future restoration to St. Joe's pine tree farms, which had degraded some wetlands area.

The court held in the Corps' favor, finding the Corps relied on mitigation in the past to calculate impacts. Secondly, EPA guidelines used mitigation to assess environmental benefits. And finally, while the individual impacts would not be known for each project, the Corps had already determined "overall limits of the impacts."

The final aspect of the Sierra Club's argument against the Corps' determination of "minimal adverse environmental impacts" was that the Corps' science was flawed on four levels: (1) the mitigation plans were too vague; (2) the calculations lacked "scientific rigor"; (3) the mitigation plans were not adequate; and (4) the Corps had not addressed water quality purposes under the CWA. The court rejected each claim in turn.

The Sierra Club claimed that the mitigation plans only contained preferences and not details regarding the mitigation plans. The court held that the pre-authorization meetings before the Corps would authorize a project provided the appropriate venue to work out the details of mitigation measures. Next, the court held the Corps had completed significant scientific work and linked impacts with the proposed mitigation. The court gave deference to the Corps on technical and scientific matters. Additionally, the court held the Corps calculations accounted for risk of failure and "temporal loss of functioning," and therefore the plans were adequate. Finally, the Sierra Club argued that the Corps had not explored the differing possibilities of water quality issues stemming from differences in run-off from a golf-course to run-off from a parking lot. The court held the argument unconvincing, as the permit's requirements for water quality were higher than Florida's water quality requirements, and therefore necessarily met the EPA's requirements unless the EPA added "other water quality aspects." Instead, the EPA endorsed the permit.

The Sierra Club's fourth major argument was that the Corps did not follow the EPA's 404(b)(1) guidelines in granting the permit. Those guidelines "set forth regulations regarding compliance, testing, evaluation, and minimization of adverse effects" in order to perform a benefit/detriment test. Failure would require a remand to the Corps. The Sierra Club pointed to language that activities under a general permit must be similar in their water quality impacts. It, once again, highlighted the diverse variety of activities potentially permitted. The court held the Corps' determination of the uniformity of the wetlands sufficient. Additionally, the Sierra Club argued that the Corps had not set forth in writing a "precise description of activities to be permitted." Though the court held the Corps had not done so, the court held a remand unnecessary because the error was harmless; the Corps could easily fix the oversight.

The Sierra Club's final argument questioned the Corps compliance with NEPA. Federal agencies are required to perform an EA to determine if a broader, more detailed Environmental Impact Statement ("EIS") is required. After the Corps' completed the EA, it issued a FONSI and therefore was not required to perform an EIS. For an agency to reach a FONSI, NEPA requires that agency to take a "hard look" at the evidence to satisfy the process. However, United States Supreme Court precedent indicates a court must be "highly deferential" regarding technical or scientific evidence. The Sierra Club questioned the agency's "hard look," their FONSI determination, and whether the Corps had completed the appropriate alternatives analysis. The court held the Corps had satisfied each claim.

The court looked at the 4500 pages of record and held that the Corps did not need NEPA to "remind it to take a hard look at the impacts of its actions." It already had. Regarding the FONSI determination, the Corps admitted to relying on mitigation measures. The court held mitigation measures must be "more than a possibility." They must "constitute an adequate buffer so as to render such impacts so minor as to not warrant an EIS." The court held that the science supported both the mitigation and the special conditions attached to the permit. Finally, regarding the Corps' search for alternatives, the court held the Corps had detailed a no action alternative and individual permitting alternative in its EA. The court held the Sierra Club's argument inadequate because it lacked a genuine discussion, only "summarily dismisses" the Corps' work, and had no suggestions of its own. Further, an EA requires a lower standard of alternatives discussion than an EIS.

In addition to holding in favor of the Corps on all of the Sierra Club's claims, the court also vacated the preliminary injunction. The court ended by holding the Corps' issuance of the permit, "is at, but not beyond, the outer limits of that authority."

Zackary Smith

Ky. Waterways Alliance v. Johnson, 426 F. Supp. 2d 612 (W.D. Ky. 2006) (holding that the EPA did not act arbitrarily or capriciously when it approved the procedures providing administrative and judicial review under Kentucky's permitting process and that Kentucky's antidegradation procedures meet the requirements of the CWA).

Kentucky Waterways Alliance ("Waterways") sought summary judgment against United States Environmental Protection Agency ("EPA"); Waterways asserted that the EPA acted arbitrarily and capriciously when it approved Kentucky's Tier II Antidegradation Rules and did not ensure the protection of existing "high quality" water as required by the Clean Water Act ("CWA"). States establish their own methods for identifying which waters in its boundaries require Tier II protection and the EPA may give final approval to the chosen method. When a