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City of Olmsted Falls, Ohio v. U.S. Evtl. Prot. Agency, 435 F.3d 632

Christopher Jensen

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effects of the activities authorized by NWP 21. Further, its partial reliance on post-issuance procedures to ensure minimal impacts did not make those determinations any less valid. Finally, the court concluded that section 404 does not preclude the Corps from issuing a general permit that contains a requirement of post-issuance individualized consideration or authorization by the Corps.

The court of appeals vacated the judgment of the district court and removed the injunction against NWP 21 authorizations.

Tracy M. Talbot

SIXTH CIRCUIT

City of Olmsted Falls, Ohio v. U.S. Env'tl. Prot. Agency, 435 F.3d 632 (6th Cir. 2006) (holding that (1) completion of airport expansion project did not render action moot; (2) Corps properly relied on Ohio Environmental Protection Agency's waiver of its authority to act on city's application; (3) the federal antidegradation rule only places obligations on states, not on Corps; (4) compensatory mitigation was an acceptable form of mitigation to offset environmental degradation of streams and creeks; (5) Corps's decision to issue permit was not arbitrary or capricious).

The City of Cleveland sought and obtained a "dredge and fill" permit from the Army Corps of Engineers ("Corps") pursuant to Section 404 of the Clean Water Act ("CWA"). The permit, which enabled Cleveland to construct a new runway at Hopkins International Airport, allowed Cleveland to fill and culvert 7,900 linear feet of Abram Creek and some of its tributaries, as well as to fill 87.85 acres of wetlands. As a precondition to its application to the Corps, Cleveland applied to the Ohio Environmental Protection Agency ("OEPA") for certification of the airport expansion pursuant to Section 401 of the CWA. After expressing some environmental impact concerns, OEPA expressly waived its authority to act on Cleveland's Section 401 application.

The Corps issued Cleveland's Section 404 permit after accepting OEPA's waiver, subject to extensive compensatory mitigation requirements on Cleveland. The permit's mitigation requirements mandated that Cleveland either directly preserve or contribute financially toward the preservation of 4,670 linear feet of Abram Creek, both upstream and downstream of the airport, restore 265 acres of wetlands elsewhere, and contribute at least \$1,782,000 to the restoration of nearby streams. Upon issuance of the permit, Cleveland immediately began construction. Olmsted Falls, a municipality down-river of the expansion project, filed suit challenging the permit on several grounds. The District Court for the Northern District of Ohio ruled that the Corps correctly relied upon OEPA's waiver of authority, and entered judg-

ment for the Corps. Olmsted Falls appealed the district court's ruling to the Sixth Circuit Court of Appeals.

The court first ruled that completion of the airport expansion project prior to the court's consideration of the appeal did not render Olmsted Falls's claims moot, since a successful challenge to the Corps permit would require invalidation of that permit and commencement of another permitting process. Second, the court rejected Olmsted Falls's contention that OEPA was not entitled to waive its Section 401 authority, and that the Corps was not allowed to rely upon OEPA's waiver. The court held that not only did Olmsted Falls's contention contravene express statutory language allowing such express waivers, but adherence to such a position would, in effect, require the Corps to analyze and adjudge adherence to each state's rules and regulations on the issuing of Section 401 waivers.

Third, the court rejected Olmsted Falls's argument that the Corps erred in issuing the permit before deciding that Cleveland's application satisfied the federal antidegradation rule. The court held that "[b]y its very terms, 40 C.F.R. § 131.12 requires that 'State[s] shall develop and adopt . . . an antidegradation policy,'" but that the regulation only places obligations on states.

Fourth, the court rejected Olmsted Falls's challenge to the permit's compensatory mitigation requirements. Olmsted Falls argued that United States Environmental Protection Agency regulations dictate that compensatory mitigation is permissible only for wetland filling, and that avoidance and minimization mitigation are the only permissible forms of mitigation for filling other bodies of water. The court held that no federal regulation indicates that avoidance and minimization is the only permissible means to mitigate environmental impacts on streams or creeks. Therefore, the Corps permit's compensatory mitigation requirements were legally permissible.

Finally, the court affirmed the district court's two-part determination that the Corps's decision to issue the Section 404 permit was neither arbitrary nor capricious. First, the CWA's implementing regulations require that "no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States." Both courts held that it was neither arbitrary nor capricious for the Corps to balance the runway project's environmental harm against the benefits of the proposed compensatory mitigation and find that, on balance, the project would not contribute to a significant degradation of the waters of the United States. Second, the regulations provide that "[n]o discharge of dredged or fill material shall be permitted if it: (1) Causes or contributes . . . to violations of any applicable State water quality standard . . ." The district court cited an OEPA mitigation order deliberately issued as a condition of the waiver process as evidence that the project did not violate Ohio water quality standards. As a result, the court affirmed the dis-

strict court's determination that the Corps's decision to permit the project was neither arbitrary nor capricious.

For the above reasons, the court affirmed the district court's judgment in favor of the Corps.

Christopher Jensen

SEVENTH CIRCUIT

Texas Indep. Producers and Royalty Owners Ass'n v. Env'tl. Prot. Agency, 435 F.3d 758 (7th Cir. 2006) (holding Texas Independent Producers and Royalty Owners Association lacked standing to challenge permits for uncontaminated discharge pursuant to the Clean Water Act because the Energy Policy Act of 2005 exempted the organization from the permitting requirements).

In 2005, the Texas Independent Producers and Royalty Owners Association ("Producers") challenged the Environmental Protection Agency's ("EPA") issuance of general permits for storm water discharge from construction activities pursuant to the Clean Water Act ("CWA"). The Producers challenge only the application of the general permits to uncontaminated discharge. The Producers argued that the EPA's definitions of "common plan" and "final stabilization" in the general permit requirements are overly broad. They argued that these broad terms violated their right to due process because they could not tell if they were required to obtain general permits based on the definitions. They also argued that these definitions are arbitrary and capricious because the EPA failed to consider the differences between various construction activities.

The United States Court of Appeals for the Seventh Circuit stayed these arguments pending a Fifth Circuit Court of Appeals decision determining if oil and gas producers were required to obtain general permits. The Fifth Circuit held that the issue was not ripe for review, and the Seventh Circuit ordered the parties to file a supplemental brief addressing the significance of the finding. While completing the brief, Congress passed the Energy Policy Act of 2005 ("Act"), which expressly exempts construction activities of oil and gas companies from the CWA permitting requirements for uncontaminated waste.

The Producers submitted a motion to dismiss without prejudice in light of the Act, suggesting that the matter was not completely resolved until the EPA responded to the Act. The court held that although the issue was ripe for review, the Producers no longer had standing to challenge the issues involving general permits because the Act expressly exempted them from the permitting requirements. The court dismissed the case for lack of standing.

Diane O'Neil