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Friends of the Earth, Inc v. U.S. Army Corps of Eng'rs, 109 F. Supp. 2d 30 (D.C. 2000)

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adopting a zero MCLG for chloroform was arbitrary and capricious and in excess of statutory authority. Thus, the court vacated the rule. Additionally, the court planned to issue a separate order for briefing on additional remedies.

Kris A. Zumalt

Friends of the Earth, Inc. v. U.S. Army Corps of Eng'rs, 109 F. Supp. 2d 30 (D.C. 2000) (granting environmental groups' motion for summary judgment as a result of inadequate Army Corps of Engineers' analysis of environmental impacts in environmental assessments for proposed barge-casino projects requiring Clean Water Act and Rivers and Harbors Act permits).

Based on its analyses documented in separate environmental assessments ("EAs"), the United States Army Corps of Engineers ("Corps") issued Findings of No Significant Impact ("FONSIs") and thereafter granted the necessary permits under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act for three proposed Mississippi coast casino projects. Alleging the inadequacy of each EA, several environmental groups, including Friends of the Earth, Inc. ("FOE"), successfully challenged the Corps' determination that each proposed floating-casino project would not result in significant environmental impacts, and thus, did not require the preparation of environmental impact statements ("EISs") prior to issuing the permits.

Specifically, FOE alleged the Corps failed to adequately consider the relevant direct, indirect, and cumulative impacts of the proposed projects as required under the National Environmental Policy Act. The court found the Corps' consideration lacking in each respect. The court outlined the four-step analysis applicable to judicial review of an agency's decision to forego preparation of an EIS in favor of an EA. The court must determine whether (1) the agency accurately identified the appropriate environmental issues; (2) the agency took a "hard look" at the concern in preparing the EA; (3) if a FONSI is issued, the agency must be able to make a convincing case for its finding; and (4) if the agency finds a significant impact, an EIS must be prepared unless modifications or conditions imposed upon the project reduce that impact to a minimum.

The court recognized the strong presumption in favor of upholding decisions of the Corps and the applicable deferential standard of review. However, the court recognized its duty to make a thorough, in-depth review of the Corps' decision to ensure the agency adequately considered all relevant factors and reached a rational decision. Pointing to the fact that each state and federal agency which commented on the proposed projects expressed concern about the potential environmental impacts and suggested that the Corps prepare

EISs in connection with the proposed projects, the court found the Corps' issuance of FONSI's unsupportable, leaving many relevant environmental questions unanswered. The court also noted the Corps' issuance of the permits disregarded the directions of the Deputy Assistant Secretary of the Army, who, while the permit applications were pending, instructed the Corps not to issue any further permits for floating-casino projects in the counties where the proposed projects were sited before the completion of a Programmatic EIS addressing casino development in the region.

The court examined the Corps' treatment of direct impacts, such as dredging, impacts on water quality, wetlands, aquatic habitat, intake of larvae and eggs, and aquifers, and the effects of scouring and shoaling on the development area. Although the court found the Corps' analysis of several of these direct impacts sufficient, in discussing the projects' affects on aquatic life, intake of larvae and eggs, and impacts on wetlands, the court found the Corps' documentation conclusory and lacking in substantive analysis. The court next reviewed the Corps' analysis of indirect impacts. The court found the Corps' jurisdiction encompassed the "heart of the development projects." Moreover, the Corps expected secondary development to flow from these projects. The Corps' failure to analyze the impacts of these future projects rendered its review of indirect impacts on the development area insufficient. In examining the Corps' consideration of cumulative impacts, the court found the Corps' conclusory analysis dismissing the significance of such impacts inadequate because over twenty casinos had been permitted previously along the Mississippi coast and significant controversy already existed over the cumulative impacts of such development.

Finally, FOE claimed the proposed projects necessitated the preparation of EISs because the foreseeable resulting impacts were "significant" by definition. The court found the "context and intensity" of the foreseeable impacts, including the ecologically critical nature of the project areas and the highly controversial nature of the impacts, qualified the impacts as "significant." The court concluded the Corps must prepare EISs, including adequate analysis of all foreseeable direct, indirect, and cumulative impacts noted in the administrative record, before it may issue any permits for the casino projects. Thus, the court granted summary judgment in favor of FOE.

Lucinda Henriksen

Indus. Enclosure Corp. v. N. Ins. Co. of N.Y., No. 97 C 6850, 2000 U.S. Dist. LEXIS 11567 (N.D. Ill. July 26, 2000) (holding, within the meaning of an insurance policy exclusion, the term flood is unambiguous, and water that flows into an area that is normally dry is a flood even if it is caused artificially).