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Entire Development Project Is Within Army Corps Of Engineers' Purview If The Project's Viability Is Dependent On The Issuance Of A Clean Water Act Permit

In *White Tanks Concerned Citizens, Inc. v. Strock*, (--- F.3d ---, C.A.9 (Ariz.), April 29, 2009), the United States Court of Appeals considered whether the Army Corps of Engineers ("Corps") conducted an adequate study under the National Environmental Policy Act ("NEPA") before making a finding of No Significant Impact in its decision to issue a permit under the Clean Water Act for a project where a developer sought to fill ephemeral washes that run through the area sought to be developed. The Court of Appeals held that the Corps erred in limiting its environmental review to only the washes and immediate uplands, because the court found that no substantial development could go forward without affecting the jurisdictional waters.

Facts

Developers sought to build thousands of homes in a desert area that was relatively undisturbed. White Tanks Concerned Citizens, Inc. ("Citizens"), is a non-profit organization that formed to oppose the developments. The developers wanted to build a planned community called Festival Ranch. The developers sought a dredge and fill permit from the Corps to fill in washes that were dispersed throughout the project area.

The development site occupies 10,105 acres which are traversed by 787 acres of washes, 643 acres of which would not be disturbed by the development. The 144 acres that remain are dispersed throughout the project site, and the projected development would fill 26.8 of those acres. The Clean Water Act permit, known as a Section 404 permit, was needed because development of the project site required dredging and filling the desert washes, which are considered to be within the Corps' jurisdiction under the Clean Water Act.

The Corps limited "its scope of environmental analysis to the washes themselves and certain

upland areas directly affected by the dredge and fill activity." The Environmental Protection Agency and the Fish and Wildlife Service expressed concern that issuing the requested permit would have "unacceptable environmental impacts" and urged the Corps to conduct "a full-scale environmental analysis," that included an environmental impact statement ("EIS") to address the "large-scale direct, secondary, and cumulative impacts of the project." Citizens also submitted negative comments to the Corps. The Corps, however, did not expand its environmental analysis or prepare an EIS. Instead, the Corps made a finding of no significant impact after concluding that the issuance of the permit would not cause significant environmental impacts to the 787 acres of washes and the 83.6 acres of uplands that are immediately adjacent to the washes. Citizens filed a lawsuit against the Corps. The federal district court found in favor of the Corps.

Decision

The Court of Appeals first found that Citizens had standing to bring the lawsuit because its members alleged that they regularly used the area at issue for recreational and aesthetic purposes. The court found that, because all of Citizens' "members would have standing to sue, [Citizens] does too because the suit is germane to the organization's purpose and the requested relief—in this case injunctive—does not require individual participation."

The court also found that the district court erred in granting judgment in favor of the Corps. The court noted that the jurisdiction of the Corps to issue a permit under the Clean Water Act is different from the scope of analysis that is required for an environmental evaluation under NEPA. The ephemeral washes that give rise to the jurisdiction of the Corps to issue a Section 404 permit represent a very small part of the large development. "The

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scope of the environmental review under NEPA, however, must be dictated by the environmental effects triggered by the filling of those washes” and may expand well beyond the waters that provide the initial jurisdictional trigger.

The court distinguished a project in which waters are dispersed throughout a development such that no development could proceed without filling the waters, and a project in which most of the development area could be developed without filling the waters. In the first instance, a federal Section 404 permit is necessary and the NEPA analysis should include the entire property. In the second instance, a “no-action alternative” is available under NEPA because a major portion of a development could proceed without a Section 404 permit. Here, the construction of Festival Ranch would be impossible without the issuance of the Section 404 permit because the washes that would have to be filled are not all confined to particular portions of the development site. Further, if the washes were not filled in, the development could not be constructed as a cohesive master-planned community, and the project would merely consist of unconnected and isolated clusters of development. The developer even admitted it could not build the master-planned community without filling in the 26.8 acres and that a “no-action alternative” was not feasible.

It was clear that the project’s viability hinged on the Corps’ issuance of the Section 404 permit. The court, therefore, concluded that because the project depended on the issuance of the permit, the entire project was within the Corps’ purview. Because “the Corps unreasonably narrowed its scope of analysis,” the appellate court reversed the decision of the district court. It remanded the case and directed the district court to enter an injunction against the issuance of the Section 404 permit until such time as “requisite environmental analysis is accomplished.”

Questions

If you have any questions concerning the content of this Legal Alert, please contact the following from our office, or the attorney with whom you normally consult.

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