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Decisions of Federal Agencies to Approve Construction in California Wetlands Were Not Arbitrary and Capricious

In *Butte Environmental Council v. United States Army Corps of Engineers*, (--- F.3d ----, C.A.9 (Cal.), June 01, 2010), the United States Court of Appeals for the Ninth Circuit considered whether the decisions of the United States Army Corps of Engineers ("Corps") and the United States Fish and Wildlife Service ("FWS") to approve construction on protected California wetlands were arbitrary and capricious. The court of appeals held the decisions were not arbitrary and capricious.

Facts

The City of Redding prepared a draft environmental impact statement ("EIS") for a business park it planned to construct on a 678-acre site situated on wetlands along Stillwater creek. The draft EIS was to serve as a precursor to its eventual application for a section 404 permit pursuant to the Clean Water Act, which City would be required to obtain because the project "would entail the discharge of dredged or fill materials into protected wetlands." The draft EIS concluded the site chosen by City, known as the Stillwater site, "was the least environmentally damaging practicable alternative."

The Corps reviewed and commented on the draft EIS. The Corps stated the "Stillwater site 'does not appear to be the [least environmentally damaging practicable alternative], as there may be less environmentally damaging alternatives for this project'" that will still meet the project's purpose. The Environmental Protection Agency ("EPA") questioned City's rejection of "alternative 4." The EPA stated City had failed to articulate "a compelling need for a contiguous 100-acre parcel as a centerpiece of the project."

City filed a supplemental draft EIS to defend its position to reject sites that could not support at least a one 100-acre parcel. The report stated City had engaged in discussions with other

agencies that resulted in modifications to the project. City agreed to modify the "footprint" of the project site "to reduce impacts to waters of the U.S.," to designate 296 acres as "permanent Open Space," and to prohibit bike paths and roads. City claimed these modifications would reduce the "direct wetlands impact" from 7.13 acres to 6.50 acres, which City claimed would reduce the impacts on plants and crustaceans listed on the Endangered Species Act.

After City published its final EIS, it applied for a section 404 permit. The Corps reviewed the alternative sites but "concluded that the proposed Stillwater site was the least environmentally damaging practicable alternative" and that City had demonstrated there was no "practicable alternative sites available." After concluding the issuance of the permit would not be contrary to the public interest, Corps granted City's application for a section 404 permit.

The FWS issued a biological opinion in which it concluded that the project at the Stillwater site would destroy 234.5 acres of critical habitat for the vernal pool fairy shrimp and the vernal pool tadpole shrimp. This amounts "to 0.04% of the fairy shrimp's 597,821 acres of total critical habitat nationwide and 0.10% of the tadpole shrimp's 228,785 acres of total critical habitat nationwide." City proposed to offset these effects by creating or restoring some of the habitat and preserving another 18.64 acres at other locations. The Stillwater site also contains 500 acres of critical habitat for the threatened Orcutt grass. The project would destroy 242.2 acres, or 0.26% of the grass's nationwide habitat. City promised to compensate for the loss by creating or restoring a suitable grass habitat. The FWS concluded the proposed project "is not likely to jeopardize the continued existence" of the shrimp or grass and "would not result in the adverse modification or destruction of [the species'] critical habitat."

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Butte Environmental Council (“Butte”) filed a lawsuit in federal court against the Corps and the FWS. Butte sought judicial review pursuant to the Administrative Procedures Act of the Corps’ decision to issue a section 404 permit, and FWS’s opinion regarding the threatened and endangered species. The trial court granted judgment in favor of the Corps and the FWS.

Decision

The court of appeals affirmed the decision of the trial court. The court of appeals held Corps applied the proper presumption under 40 C.F.R. § 230.10(a)(3) and found City rebutted the presumption when it “clearly demonstrated that there are no practicable alternative sites available.” Butte argued “Corps’ decision to issue a section 404 permit was inconsistent with its earlier criticism of the City’s draft EIS.” However, City modified its original plan after Corps commented on the draft EIS. As a result of the changes made by City, the impact to the wetlands was reduced. Corps did not reverse its decision, but instead made a new decision after further meetings, investigations, and reports. The court found that “the process worked just as it should.” Agencies are not prohibited from changing their minds. The court also found that “[g]iven the back-and-forth between the City and the Corps, [it had] no trouble discerning the path of the agency’s reasoning over time.”

Butte asserted “Corps never made an ‘independent determination’ of the project’s purpose or the size of the parcel needed” and “simply deferred” to City’s judgment on the project. Corps initially expressed skepticism that City required a site large enough to accommodate a 100-acre parcel. City then revised the EIS to clarify its need for a site large enough to accommodate such a parcel. Ultimately, Corps accepted the revised statement of purpose submitted by City. The court concluded that “Corps’ consideration of the project’s stated purpose was not unreasonable.”

The court rejected Butte’s challenge to the Corps’ decision to reject an alternative site that

it concluded would cost substantially more to develop than the Stillwater site. Similarly, the court rejected Butte’s claim “that the Corps improperly relied on the City’s proposed off-site mitigation as part of its analysis.” Butte argued the Corps allowed City to adopt “off-site mitigation measures to relieve City’s of its responsibility to adopt the least environmentally damaging practicable alternative.” The court concluded that while “Corps made compensatory mitigation a condition of the permit, there is no indication that such mitigation was meant as an obligation *in place of* the City’s responsibility to adopt the least environmentally damaging practicable alternative, as opposed to an obligation *in addition to it.*”

The court found that the Corps decision to issue City a section 404 permit was not arbitrary and capricious. The court reached the same conclusion as to FWS’s biological opinion. FWS did not apply an improper definition of “adverse modification” pursuant to section 7 of the Endangered Species Act. Also, FWS’s determination that critical habitat would be destroyed was not inconsistent with its finding there were to be no “adverse modification” of critical habitat because the project would only affect a very small percentage of the total habitat for the shrimp and the grass. FWS also did not improperly mask the localized impact of the project by focusing on the total critical habitats of the species at issue. Furthermore, FWS was not required to address the rate of loss of critical habitat for the species at issue.

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.

Mona G. Ebrahimi or Daniel J. O’Hanlon |
916.321.4500