Hospital/404 Wetland Permit: U.S. District Court Addresses Challenge to U.S. Army Corps of Engineers Alternative Analysis/Public Interest Review

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A United States District Court (N.D. Ohio) ("Court") addressed in a September 9th Order an issue involving the Section 404 Clean Water Act wetland permitting program. See *Friends Mahoning River v. U.S. Army Corps of Engineers*, WL 4133763.

The basis for the United States Corps of Engineers ("Corps") issuing a 404 permit for a new medical complex in jurisdictional wetlands was challenged.

The Corps issued a 404 permit ("Permit") to North Eastwood, LLC ("North Eastwood"). The Permit authorizes North Eastwood to permanently destroy and fill 15.95 acres of wetlands and 1,608.5 linear feet of streams in Trumbull County, Ohio.

The Permit involved North Eastwood's proposed "Enterprise Park Project." It would authorize the construction of a hospital along with medical, office, and residential outbuildings in jurisdictional wetlands.

North Eastwood's permit application included an evaluation of 23 alternative proposed sites for the projects. Self-identified necessary criteria were utilized.

In considering the application the Corps stated:

While the applicant included proximity to accessory amenities and the appropriateness of existing zoning in their analysis, the Corps only considered location and proximity to geographic center to allow the hospital to act as a hub for medical services for the Trumbull County region, size of parcel, accessibility, environmental feasibility, and estimated aquatic resource impact.

In its required 404 alternative analysis North Eastland stated:

- The preferred site had the least amount of impact on aquatic resources
- While certain alternate sites would have less environmental impact, it did not believe that those alternatives would meet the Project's needs

The North Eastwood application was public noticed and comments received were addressed. However, the Corps did not conduct an independent review of the project's economic viability/financial projections.

The site North Eastwood selected was approved by the Corps on the basis that there was no "practicable" alternative.

The Permit required North Eastwood to offset the impact of the project on aquatic resources by purchasing 30.5 wetland acre credits and 1,620 linear feet of stream credits from an In Lieu Fee Program servicing the Mahoning watershed. The cost of these credits was $2 million. Further, North Eastwood agreed to preserve a specific area of wetlands and streams adjacent to a creek that was roughly 38 acres.

The Corps conducted a public interest review to weigh the expected benefits of the project against the foreseeable detriments. It determined the foreseeable detriments did not outweigh the expected benefits.

The Friends of the Mahoning River ("Friends") filed a judicial action challenging the issuance of the Permit It argued that the alternative site's analysis, public interest review, and mitigation requirements were improper. The public interest review was alleged to have failed to include the required findings related to the project's purpose (as defined by the Corps) and the public need for the project. The alternatives analysis was argued to have been predetermined and that alternatives were not given a fair examination.

The Court notes that the Corps analysis is required to be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. The various factors weighed are to be identified and weight given to each factor is project-specific.

In weighing whether a permit should be issued, it is noted by the Court that there is a presumption that most wetlands constitute a productive and valuable public resource, and unnecessary destruction should be discouraged as contrary to the public interest.

The Court holds that the Permit was issued in an arbitrary and capricious manner and therefore grants Friends' Motion for Summary Judgment. This holding is based on its conclusion that the Corps' analysis did not properly establish that it is in the public interest to authorize a project that involves the construction of a:

. . . massive hospital and residential facilities with a declining population in the area. Many factors, including many large businesses leaving the area, have led the population of this specific area of Trumbull County to decline even more than in surrounding counties.

The Court concluded the Corps reached an erroneous conclusion that the population in the area was increasing. This conclusion is stated to have been a basis for the Corps finding that there was a public need for the project.

The Corps had argued the information concerning the population in its public need analysis was not dispositive. It believed that North Eastwood's decision to relocate, the age of the local population, and the development around the proposed location support the public and private need. The Court considerd North Eastwood's desire to increase revenues of minimal value to the analysis.

The Court also addressed the Corps' alternatives analysis. The Corps' 404 regulations provide that an alternative is practicable:

. . . if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

In other words, a discharge of dredged or fill material cannot be permitted if there is a practical alternative that would have a less adverse impact.

The Court expressed concern over the Corps' dismissal of two alternatives:

- No-build alternative (i.e., modify the existing facility)

- Old Avalon Golf Course

The no-build alternative involved renovation of the existing hospital. The United States Environmental Protection Agency had expressed concern that North Eastwood project purpose was too narrow and did not comply with the Section 404(b)(1) guidelines.

The Court cites North Eastwood's response which relied:

. . . on needs of the population, and asserted need for a "bigger, better, and more appealing hospital," than the one it currently operates.

The inaccuracy of the population data was stated to undermine these projected needs.

As to the Old Avalon Golf Course, it was rejected by North Eastwood because there was no direct vehicle access.

The Court cites various aspects of this property that may not be characterized as perfect access but, nevertheless, could be considered a practicable alternative. Further, the site was deemed to have attributes that in fact were superior to the chosen site. Neither the applicant nor the Corps were deemed to have adequately explained why the additional access/vehicle traffic were necessary for the site to be considered practicable.

The Court therefore holds that the action of the Corps was arbitrary and capricious, an abuse of discretion, and in violation of Section 404 of the Clean Water Act. The 404 Permit is vacated and remanded for further proceedings.

A copy of the Order can be downloaded here.