Flood Project Challenge/Clean Water Act/National Environmental Policy Act: Federal Appellate Court Addresses Standing Issue

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

07/11/2025

Co-Author Sawyer Swaim

The United States Circuit Court of Appeals for the Fifth Circuit ("Fifth Circuit") addressed in a December 24th, 2024 Opinion a challenge to a United States Army Corps of Engineers ("Corps") project alleging violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4347 and the Clean Water Act, 33 U.S.C. 1251-1389 ("CWA"). *See Ondrusek v. United States Army Corp. of Engineers*, 123 F.4th 720 (5th Cir. 2024).

The question addressed was whether the plaintiffs had Article III standing.

The Corps partnered with the City of Dallas, Texas (both Defendant Appellees) for a project called the Dallas Floodway Extension ("DFE"). The project plan was issued in 1999 along with an environmental impact statement ("EIS") under the NEPA. The EIS was supplemented in 2003.

The project sought to implement a chain of wetlands as well as two levees located in the Cadillac Heights and Lamar areas of Dallas. The Cadillac Heights Levee intersects with the Ondrusek's property (plaintiff-appellants).

The couple filed an action in federal district court for declarative and injunctive relief. They alleged that the Corp's failure to prepare a SEIS to account for new information, such as flood risk updates related to climate change and changes to engineering guidance post Hurricane Katrina, violated NEPA and the CWA. The alleged oversights were argued to cause a "serious risk that environmental impacts will be overlooked," which would harm them as their property had a "geographical nexus to the project."

The Fifth Circuit reversed the federal district courts denial of the plaintiff-appellants motion for preliminary relief for lack of Article III standing. It held that the alleged risk of overlooking environmental impacts to neighboring properties were sufficient injuries to support the property owners' standing and that the harm alleged by property owners fell within the "zone of interests protected by the CWA and the Administrative Procedures Act" required for statutory standing.

Pursuant to case precedent, to bring a suit, the plaintiff must have an "injury in fact," which in the context of the environment, can be met via injuries to the aesthetic, conservational, and recreational interest and enjoyment of a particular tract of land or environment. The Fifth Circuit cited NEPA case law for the proposition that plaintiffs are not required to show "actual damage" to absolute certainty.

The alleged injury was related to a lack of due diligence in the preparation of an EIS related to the ongoing project. The plaintiffs do not lose the ability to sue for their interests merely because the claim involves risk that may not arise until some point in the future. This was due to the fact that one objective of NEPA was to prevent such risks from coming to fruition. Further, a property geographically tied to a development that faces the risk of unnecessary flooding, damage to surface and subsurface soils, surface and groundwater, and the migration of contaminants were held to generally fall within the zone of interest protected by NEPA and the CWA.

Therefore, the Fifth Circuit reversed the federal district court's dismissal of the suit with respect to the Corps and affirmed the dismissal with respect to the City of Dallas and remanded the case for further proceeding consistent with their holding.

A copy of the Opinion can be downloaded here.