

CLEAN WATER ACT PERMIT IGNORED ADVERSE IMPACTS  
ON PARK ENVIRONMENT

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One of the more significant tasks for the 103rd Congress is to reauthorize the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251 to 1387 (popularly known as the "Clean Water Act"). Until such reauthorization legislation is enacted, the existing Clean Water Act will remain in effect. Further, the existing Clean Water Act can be expected to provide the basic framework for Congress to reauthorize this major piece of environmental legislation.

The original Clean Water Act, passed in 1972, established a national and policy objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." In addition, the Act establishes a national goal to attain a level of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water."

To enhance and maintain the environmental integrity of water resources, Section 404 of the FWPCA (33 U.S.C. § 1344) requires a federal permit for any "discharge of dredged or fill material into the navigable waters." The Army Corps of Engineers (COE) administers the Section 404 "dredge and fill" permit program in conjunction with the Environmental Protection Agency (EPA). The Clean Water Act authorizes denial of a "dredge and fill" permit request whenever, after notice and opportunity for public hearings, the administrative record (AR) indicates that "the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." Further, the Act requires that such "dredge and fill" permit determinations shall set forth in writing and make public the findings and reasons for making any determination.

In addition, the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, requires that an Environmental Impact Statement (EIS) be prepared for "all major federal actions significantly affecting the quality of the human environment." Conversely, an EIS is not required when evidence contained in the federal agency's Environmental Assessment (EA) is sufficient to support a Finding of No Significant Impact (FONSI). As illustrated by the "Rebsamen Park" case described herein, a federal court will not disturb these permit determinations, unless the action taken is "arbitrary and capricious" in light of evidence on the record. In this particular instance, the COE issued a dredge and fill permit without properly assessing the adverse impacts of the proposed project on effected recreational areas. As a result, an EIS would have to be properly prepared before the proposed project could proceed.

Expressway to your Park?

In the case of *Audubon Society of Central Arkansas v. Dailey*, 761 F.Supp. 640 (E.D.Ark. 1991),

an environmental preservation organization and users of affected public park areas objected to the issuance of a federal permit by the Army Corps of Engineers (COE) authorizing the City of Little Rock (City) "to deposit fill material for constructing a bridge over Jimerson Creek and a jogging path in connection with the extension of Rebsamen Park Road." The facts of the case were as follows:

[The Rebsamen Park Road project] was originally ranked at the bottom of the top 20 [street projects] list, was reprioritized by the City in 1989 to the top four or five partly due to the proposed 40-acre Riverdale Harbour development of marina, clubhouse restaurant, high-rise apartments and office and commercial buildings. The harbor developer observed that the road extension would provide easy westward access to the area.

After approval of the bond issue by the voters [providing funding for the project], the City submitted an application to the COE for a permit to allow the placement of fill material in and along Jimerson Creek banks to allow the construction of a bridge over the Creek and for the placement of fill in and along certain areas of the River bank to allow the construction of bike paths.

The application for permit was filed under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. During the permit review process, the COE gave notice of the application to applicable federal and state agencies for their review and comments. The Arkansas Department of Parks and Tourism, by letter dated September 20, 1989, indicated they would support the proposed road extension if the City makes every effort to ensure the safety and enjoyment of the users of the recreational area by setting the speed limit at no greater than 35 mph and reduced to 20 mph through the activity areas and separating the vehicle lanes and bicycle/pedestrian lane by physical barrier at the bridge, and that the jogging path is developed concurrent with the road construction.

[Bill Henson, the COE Project Manager in the Regulatory Branch, had calculated] the traffic counts with different speeds in terms of pedestrians crossing the road and vehicles turning at the intersections. At the peak coinciding recreational and commuter periods, a vehicle would pass every 4.5 seconds with a traffic volume of 8,000 Average Vehicles Per Day (AVPD) and every 3.6 seconds using the 2010 Pulaski Area Transportation Study (PATs) projection approaching 10,000 AVPD.

A consultant retained by the COE had given the opinion that the expected increase in traffic will be the result of increased through traffic use, not a threefold increase in the use of recreational facilities. While he opined that traffic volumes increasing to only 4,500 AVPD and a compliance with a 35 mph speed limit would be tolerable, adverse impact on the recreational uses the road is intended to serve would result from traffic conditions which exceed the 4,500 AVPD projected by the City. The COE's Engineer Manual for Design of Recreation Areas and Facilities states that recreational

roadways should be designed for 20 to 30 mph.

The stated purpose of the proposed road extension was "to provide more convenient access to the multiple parks and recreation facilities existing along this portion of the River bank, including Murray Lock and Dam, LaHarpe Park, Murray Park, Rebsamen Park and Golf Course. The roadway forms a portion of the City's chain of parks concept. (LaHarpe View Park is owned and operated by the COE. The COE had given the City approval and consent to the construction of a street across COE property near LaHarpe View Park.)

Persons in favor of the road extension have commented that the extension would provide another traffic artery if Cantrell Road were blocked by an accident or emergency; that fishing access and viewing by the handicapped would be improved; that tourists from I-430 could use the park; and that with the separate bike lanes and jogging path, it will be safer for these uses.

Persons opposing the project have expressed concerns to the COE regarding possible adverse impacts on the following: (a) walking; (b) jogging; (c) biking; (d) nature observations that have developed at Murray and LaHarpe View Parks; (e) air quality; (f) safety of recreational uses because of increased traffic; (g) safety for bikers, joggers and motorists over the Jimerson Creek bridge; (h) deterioration of bank fishing and bird watching; and (i) effects on wetlands.

The First Draft of the EA by Henson recommended that the permit be granted "with the imposition of special conditions" including the following:

A 25 mph speed limit and a traffic monitoring and measuring plan that would require the construction of traffic blockers to prevent any motorized vehicle traffic across the bridge from 7:15 to 8:15 a.m. and 4:30 to 5:30 p.m. if the through traffic component of Rebsamen Park Road exceeds 1,000 AVPD.

A Second Draft of the EA, however, recommended that the permit be denied "based on the negative impacts" of traffic increases on recreational use of the park.

Applying the industry standard and the Institute of Transportation Engineers, Transportation and Traffic Engineering Handbook, the draft found that theoretical maximum recreational use of the recreational facilities along the road will occur at 7,550 AVPD when the traffic increases to the limit where there is just time to leave the road for parking or access the road from parking when in actuality some recreational users will judge the traffic and sight distance unsafe long before that and stop using the park.

To offset the projected adverse impacts, special conditions as recited above in the First Draft would be required. However, those conditions would place a very heavy

enforcement burden on the COE and would be impossible to enforce. This draft denied the permit as contrary to the public interest.

In the "Final EA Statement of Findings and Permit Determination" regarding the project, the COE concluded that "the Project was not a 'major federal action significantly affecting the quality of the human environment', that an EIS was, therefore, not required." This Final EA, in contrast to the earlier two drafts, did not mention recommendation of denial by COE engineers "due in part to the current traffic enforcement problem."

While acknowledging that an expected large increase in traffic through the area could adversely affect recreational uses, the EA concludes that "it is expected that City of Little Rock officials will take whatever traffic control measures are appropriate and necessary to control traffic speeds and volumes and provide safe recreational opportunities for all."

In similar cursory fashion, the Final EA discussed and analyzed the impact of the proposed project on existing wetlands. Specifically, the Final EA concluded that "it is not expected that this wetland area will be impacted by the project" without providing any factual basis for this determination. Accordingly, the COE issued a "dredge and fill" permit under Section 404 of the Clean Water Act which did not address the impact of the project on existing wetlands, nor did the permit contain any "special conditions regarding traffic."

In its complaint, Audubon alleged that COE had not followed the "appropriate review" process required by federal law. Specifically, Audubon contended that "[n]one of the agencies that were contacted in the fall of 1989 were aware of the projections for traffic volume as developed by the COE consultant, the COE's own calculations, the PATS [area transportation study] and the City's own figures." On the other hand, Audubon did not allege that "any special habitats, historic sites, or rare or endangered species" would be "destroyed forever and irreversibly due to the project."

According to the court, the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), dictates that "a reviewing court must set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In addition, the court noted that this "APA standard of review is applicable to the COE's decision not to prepare an EIS [environmental impact statement]." As described by the court, the National Environmental Policy Act (NEPA) would require an EIS as follows:

NEPA provides in part, 42 U.S.C. § 4332(2)(C), that an EIS must be prepared for all "major federal actions significantly affecting the quality of the human environment." Defendants have acknowledged that the project is a "major federal action." At 40 C.F.R. s 1508.3, "affecting" is defined as "will or may have an effect on."

Citing the Code of Federal Regulations (CFR), the court found that "Significantly" is defined at 40 C.F.R. § 1508.27 in relevant part as requiring considerations of both context and intensity as follows:

- (a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action....
- (b) Intensity. This refers to the severity of impact..

Further, the court noted that these federal regulations required that the following factors "should be considered in evaluation of intensity":

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
- (2) The degree to which the proposed action affects public health or safety.
- (3) Unique characteristics of the geographic area such as proximity to ... park lands, ... wetlands, ... or ecologically critical areas.
- (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- (5) The degree to which the possible effects on the human environment are highly uncertain....
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about future considerations.
- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts....

In determining "whether an agency decision was arbitrary or capricious," under the circumstances of a particular case, the court acknowledged that a reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Applying this standard of judicial review to this particular situation, the court found that "the COE's decision that the issuance of the permit was not a 'major federal action significantly affecting the quality of the human environment' and that an EIS is not necessary to be arbitrary and capricious."

The AR [administrative record] shows that the COE was concerned about the effect of the project on traffic. The City was directed to furnish figures, the COE engaged its own consultant, and COE personnel made various calculations. While the COE might have been taking a "hard look," the COE ultimately chose to ignore what it saw. All the facts and scientific projections showed the tremendous increase in traffic that will occur severely impacting the recreational uses of the area.

The City's wishful thinking that the commuting public will choose Cantrell with its approximately eight more stoplights for the comparable distance and travel time over Rebsamen Park Road is without justification. The COE's misplaced reliance on the City's empty assurances that it will enforce the 35 mph speed limit flies in the face of the COE's information that the current limits are not being enforced and the public will use a speed limit 10 mph over the existing limits.

The COE was not relying on reasonable opinions of any qualified experts in concluding the impacts of the project were not significant when its own consultant and personnel had made reasoned decisions to the contrary based on their evaluations of the available data. Additionally, the COE noted in the EA [environmental assessment] that noise levels are expected to increase, but did not discuss the impact.

The EA section on aesthetics failed to mention the traffic component. The EA observes that "[a]tmospheric quality may be slightly degraded by an approximate three fold increase in traffic volume through the corridor," but then merely concludes that the adverse impact is not expected to be significant.

As a result, the court concluded that "the COE's decision that the impacts of the project lack significance on the quality of the human environment and the permit should issue is not founded on a reasoned evaluation 'of the relevant factors' and that the COE's decision to not prepare an EIS was a 'clear error of judgment'." The court, therefore, granted Audubon's motion for summary judgment "on their claim that the actions of the defendants violate NEPA... since an EIS [environmental impact statement] is required for this project, a "major federal action significantly affecting the quality of the human environment."

The COE is permanently enjoined to suspend Permit No. W-D-050-03-5830 which authorizes the City to place certain fill in the Arkansas River and Jimerson Creek for the approach and abutments of a bridge over Jimerson Creek and the defendants are permanently enjoined from proceeding any further with the construction of a bridge over Jimerson Creek pursuant to that permit until such time as an EIS in conformity with the requirements of NEPA has been completed.