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DISTRICT COURTS

Am. Canoe Ass'n v. White, 277 F. Supp. 2d. 1244 (N.D. Ala. 2003)
(holding that an agency will not receive a dam permit when it makes various assumptions but fails to take a hard look at the cumulative effects of other proposed projects in the same water basin, the future water quality of the proposed reservoir, and the downstream effects of the dam.)

American Canoe Association (“American Canoe”) sued the United States Army Corps of Engineers (“Corps”) under the National Environmental Policy Act (“NEPA”) alleging that the Corps’ decision to issue a permit pursuant to section 404 of the Clean Water Act for the construction of a dam and reservoir was arbitrary and capricious. The complaint addressed three main issues: (1) whether the Corps adequately addressed the need for an additional water source; (2) whether the Corps, in issuing a Finding of No Significant Impact (“FONSI”) rather than conducting an Environmental Impact Statement (“EIS”), failed to take a requisite “hard look” at the environmental impacts of the proposed project; and (3) whether the Corps made a convincing case for its FONSI. In essence, American Canoe asked the United States District Court for the Northern District of Alabama to vacate the permit and order the Corps to perform an EIS on the project. The court granted in part a motion for summary judgment, denied the Corps’ cross-motion for summary judgment, and ordered the Corps to take a “hard look” at the issues as required by NEPA.

The Cullman-Morgan Water District (“Water District”) was incorporated in 1993 and consists of Cullman County and the southern portion of Morgan County, Alabama. The Water District is served by Lake Catoma, a man-made reservoir. In 1995, the Nashville District of the Corps prepared two reports that considered several different options to satisfy the Water District’s growing water needs. The Corps selected the Duck River dam project as the preferred option. The proposed dam would create a reservoir that would serve as an emergency public water supply. In 1996, the Water District applied to the Corps for a permit to build the Duck River Dam. In 2000, after receiving extensive input from several state and federal agencies, the Corps issued a FONSI that indicated the proposed project would have no significant adverse effects, and issued a permit to the Water District to build the dam. Immediately thereafter, American Canoe filed an action claiming the Corps decision to issue a FONSI and not to prepare an EIS was arbitrary and capricious. They requested the court vacate the Corps’ FONSI and issue an order requiring the Corps to prepare an EIS.

In determining whether the Corps’ decision not to prepare an EIS was arbitrary and capricious, the court applied the standard

formulated by the Eleventh Circuit Court of Appeals in *Hill v. Boy*—when an agency has identified a relevant environmental concern it must take a “hard look” at the problem. If an agency issues a FONSI, it must be able to make a convincing case for its finding. American Canoe asserted the Corps failed to take a hard look at the environmental impacts of the Duck River Dam and that, even assuming the Corps took the requisite hard look, the agency failed to make a convincing case in its FONSI report.

First, the court addressed whether the Corps took a hard look at the environmental impacts of the proposed dam. The court determined that the Corps made several misinformed assumptions regarding the environmental impacts of the project and reliance on such assumptions did not constitute a hard look. While the Corps contended that they indeed took a hard look at the impacts, the court noted that the agency made numerous assumptions about the cumulative effects of other proposed projects. Specifically, agency records indicated that the Corps ultimately issued the FONSI based on its assumption, rather than any actual studies, that no cumulative impacts would result because another project, the Locust Fork Dam, had been postponed for at least ten years. Furthermore, the Corps conducted no studies that considered the impact that the Duck River Dam would have in conjunction with the Locust Fork Dam after the ten-year delay. In addition, the court noted that the Corps made an erroneous assumption about the future water quality of the reservoir. The Corps had concerns that existing phosphorous and nitrogen in the Duck River had the potential to cause accelerated eutrophication in the reservoir. Therefore, the Corps implemented a watershed plan to address the situation. However, in issuing the FONSI, the Corps made the assumption, without conclusive evidence, that the watershed plan would reduce current nutrient loadings by sixty percent. Finally, the court noted that the Corps decided not to study the downstream effects of the dam because one employee stated it was not necessary. The Corps did not conduct any scientific studies and issued the FONSI based entirely on the employee’s assumption.

Second, the court discussed whether the Corps made a convincing case for its FONSI. Even assuming that the Corps took a hard look, the court held that the agency failed to make a convincing case for its FONSI. The court held that the Corps blanket statement that any cumulative environmental effects would be eliminated by a ten-year delay in the Locust Fork project was illogical; especially in light of earlier assessments that the cumulative impacts of the two projects must be studied.

In conclusion, the court held the Corps decision to issue the FONSI was arbitrary and capricious because it did not take the requisite hard look at the environmental impacts of the proposed dam and it did not make a convincing case for issuing its FONSI. The court held the Corps could not proceed with the project until it had taken a hard look at the environmental impacts of the Duck River Dam.

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