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THE END OF THE SUBDIVISION CIVILIZATION AS WE KNOW IT?

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On January 24, 2007, the Fifth Circuit handed down its decision in O'Reilly v. United States Army Corps of Engineers and Eric Bopp, 2007 U.S. App. Lexis 1630 (5th Cir. 2007).

The case involved the permitted development of a residential subdivision on eighty acres of land, including forty acres of wetlands. The site was near Timber Branch, a tributary of the Tchefuncte River in St. Tammany Parish, Louisiana, near Covington. The developer obtained a 404 permit from the Corps of Engineers in 2004, after he had acquired 47.5 acres in a Nature Conservancy mitigation bank, agreed to a vegetated buffer zone and agreed to reduce the scope of the project into future phases. Future phases of the project would have been subject to future permitting. It was unknown if those phases would be pursued.

Local plaintiffs, through the Tulane Environmental Law Clinic, sued the Corps of Engineers under the National Environmental Policy Act and obtained an injunction against the project on August 10, 2004, ordering the Corps to do an environmental impact study. The developer had intervened in the case and later appealed the merits, but the Corps, through the Department of Justice, only appealed on a procedural issue, that is, whether the court could order the Corps to perform an environmental impact statement. The project had been documented by a shorter environmental assessment under the National Environmental Policy Act, but not a full-blown environmental impact study.

However, the Court found that the plaintiffs' NEPA segmentation argument that the environmental assessment should have treated all phases of the project, including future phases, was incorrect, as phases of a project which have independent utility and purpose need not be addressed in one environmental NEPA document. The Court further found that the lower court could not require the Corps to conduct an environmental impact study on remand, but rather the 404 permit should have been remanded to the Corps of Engineers for a new decision. It would then be up to the Corps itself to conduct the appropriate level of study, either an environmental assessment or an environmental impact study.

The Fifth Circuit did not make any novel rulings on the law, but it found that the Corps' explanations of cumulative impacts and wetland, flood, traffic, etc., mitigation measures were insufficient in the record to support the Corps' conclusion that project impacts were "insignificant" and not warranting a full-blown environmental impact study.

The case means several things. First, apparently the Corps cannot write good 404 permit decision documents and environmental assessments. They do not always even defend their permit actions in court. This should be troubling to developers and permittees who spent time and money, as they must rely on the federal agency in charge of the 404 permit program to legally justify the permits they issue, or else the permits are not worth the paper they are written on. Here, the Corps of Engineers will apparently have to legally upgrade its discussions of mitigation measures that reduce impacts, individually and cumulatively, to the insignificant level. It plans to do that on all future permits as well.

The Court had before it the Corps' cumulative impact bean-counting of a three-mile radius around the Timber Branch project, including its future phases and 72 other permits, involving 18,000 acres of land, including 400 acres of wetlands and a total of 529 acres of compensatory mitigation overall. In other words, there was "no overall net loss" of wetlands on a regional scale. The Court found the Corps' discussion of cumulative impacts insufficient and arbitrary, although the Court did not insist on any one particular cumulative impact analysis per se. However, the Court did not say what else the Corps should have said to make the analysis of cumulative impacts rational. It appears that any perfunctory discussion of impact control measures, such as of flood control, other local permits, future traffic studies for traffic patterns, etc., without a more thorough discussion of the details of how those mitigation measures work will remain legally inadequate. The Court actually tied mitigation to parish-wide or area-wide cumulative impacts, finding the Corps' explanation inadequate.

For instance, this judicial finding may mean that if there are flooding concerns, the applicant has to provide a full-blown hydrologic study as well as local drainage approval to the Corps, and not rest on the Corps conditioning the 404 permit on getting that local approval later. However, when dealing with mitigating cumulative impacts and wetland functions, probably a more learned Corps discussion of how well mitigation is working on each of the past, present and foreseeable future related projects is needed, whether compensatory mitigation is through an individual mitigation project, in lieu fee mitigation arrangement, or mitigation bank. How well is mitigation working in the cumulative impact area of study should be addressed. Are the drainage structures required by local government working? Is the mitigation bank that provides off-site compensatory mitigation in exchange for wetlands filled on site, functioning well? If not, what oversight and corrective measures is the Corps insisting upon? Is the cumulative drainage impact, fragmentation of local wetlands, etc., becoming significant? In other words, one's 404 permit will lie in the hands of the success stories of other 404 permits.

It behooves developers to go beyond routine consulting in order to make sure there is sufficient legal analysis backing up the Corps' decisions on mitigation, flood control, traffic patterns, water quality, and wetland functions. This changes the horizon upon which the Corps of Engineers acts. It will have to legally enhance the quality of their decision documents and environmental assessments, and face the inevitable prospect of one day soon preparing environmental impact statements, cumulative or individual, on more area 404 projects. Developers should also consider administratively and legally challenging Corps wetland jurisdictional determinations after the 2006 U.S. Supreme Court decision in Rapanos to avoid this bureaucratic mess. It will no longer be 404 business as usual with the Corps, be it for subdivisions, retailers, or industry.

For a copy of the full opinion and additional information about this litigation, contact **Stanley A. Millan**.