

INSIGHTS

Public Interest? Federal Court Questions USACE Review of Need for Hospital

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On September 9, 2021, the U.S. District Court for the Northern District of Ohio ruled against the U.S. Army Corps of Engineers (USACE) in a case styled *Friends of the Mahoning River v. U.S. Army Corps of Engineers*, a challenge to a Section 404 permit issued for the construction of a hospital. Although challenges to Section 404 permits are nothing new, this particular case is notable for its treatment of USACE public interest regulations – regulations that apply to all applications for Department of the Army permits by the USACE Regulatory Program. 33 CFR Part 320. Those regulations require analysis in addition to that required by the National Environmental Policy Act or the Clean Water Act. They provide that the “decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the *public interest*.” 33 CFR 320.4(a)(1) (emphasis added). They further provide that after consideration of certain criteria and specific factors including “economics” and “energy conservation and development,” “a permit will be granted unless the district engineer determines it would be contrary to the public interest.”

When challenging projects, nongovernmental organizations often try to find important impacts that USACE overlooked. What makes *Friends of Mahoning* intriguing is that project opponents focused their attack on public interest instead of impacts analysis and ultimately persuaded the court that USACE had failed to establish that the hospital project was in the public interest. In *Friends of Mahoning*, the court explained that “it has not been properly established that it is in the public interest to authorize a project that involves the construction of massive hospital and residential facilities with declining population in the area.” Of note, the court chided USACE for relying on population data from the wrong geographic area and on “concededly inaccurate statements” by the project proponent. According to the court, the agency contended that the project proponent’s own decision to develop the project established the need for the project – an argument consistent with the fact that it would be difficult for USACE to undertake its own analysis of the prospects for the new hospital since the agency is not expert in that field. The court went on to wonder whether the agency had a “predetermined outcome, for which it had worked backwards to demonstrate a need.” In the end, the court concluded the issuance of the permit—and importantly, the project’s contribution to the public interest—could not be affirmed because of USACE’s failure to consider accurate data.

Although it’s far too early to tell whether *Friends of Mahoning* signals a shift in federal courts’ willingness to invalidate permits on public interest grounds, the case could be cited in other project litigation challenging public interest determinations. Historically, the public interest has

taken a backseat to other questions about USACE decisionmaking, including the kinds and degrees of project impacts and compliance with procedural requirements under the Endangered Species Act or the National Historic Preservation Act, among others. And, when the validity of a public interest determination *has* been challenged, courts have typically not agreed with the project opposition. So courts have affirmed the Corps' issuance of a permit on public interest grounds when USACE has engaged the public on an issue through hearings and correspondence (and even when the Corps had not memorialized its public interest conclusion in a decision document). See *Back Bay Restoration Foundation, Ltd. v. U.S. Army Corps of Engineers*, 2020 WL106829 (E.D. Va., Mar. 4, 2020). And courts have shown deference to the Corps in its public interest determinations, observing that “[plaintiffs] may disagree with the Corps’ determination, but in making that determination the Corps did not arbitrarily or capriciously evaluate the public’s interest.” *Bering Strait Citizens for Responsible Resource Development v. U.S. Army Corp of Engineers*, 524 F.3d 938,949 (9th Cir. 2008).

In *Mahoning*, USACE’s own mistakes may have led the Court to invalidate the 404 Permit. In that situation, it may be that, for all except the holder of the now-vacated permit, this case is just another in the steady flow of cases lost by the government because of flaws in the Administrative Record – without meaningful substantive impact. However, with the increasing focus on many of the topics covered by the USACE public interest regulations, it is worth keeping an eye on this less-litigated aspect of the USACE Regulatory Program. And project proponents should actively support the work of federal agencies by engaging robustly in the federal review process. At least in *Mahoning*, according to the court, internal contradictions in key federal reviews led to the invalidation of an important permit. Proponent participation may be able to spot such reasoning errors ahead of final agency action, and further ensure that their own projects get completed on time.