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Butte Environmental Council v. United States Army Corps of Engineers

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***Butte Environmental Council v. United States Army Corps of Engineers*, 620 F.3d 936 (9th Cir. 2010).**

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ABSTRACT

A group of environmentalists brought suit against the United States Army Corps of Engineers, the United States Fish and Wildlife Service, and the City of Redding, California, appealing decisions to approve the City's plan to build a business park on protected wetlands. The Ninth Circuit Court of Appeals held: (1) the Corps' decision to issue a dredge and fill permit to the City was not arbitrary and capricious; and (2) the FWS' finding of no "adverse modification" did not conflict with its determination that the proposed project would destroy critical habitat of protected vernal pool shrimp and Orcutt grass species.

I. INTRODUCTION

In *Butte Environmental Council v. United States Army Corps of Engineers,*[381] the Butte Environmental Council (Council) brought suit against the United States Army Corps of Engineers (Corps), challenging the Corps' issuance of a permit under the Clean Water Act (CWA) allowing the City of Redding, California (the City), to build a business park on a wetland.[382] In addition, the Council sued the United States Fish and Wildlife Service (FWS), challenging the FWS' finding of "no adverse modification" under the Endangered Species Act (ESA) even though the proposed project stood to destroy 234 acres of protected shrimp habitat and 242 acres of protected grass habitat.[383] Pursuant to the Administrative Procedure Act (APA), the Council sought judicial review, challenging the agencies' findings in United States District

[381] *Butte Envtl. Council v. U. S. Army Corps of Engrs.*, 620 F.3d 696 (9th Cir. 2010).
[382] *Id*. at 943-44.
[383] *Id*. at 944.

Court, Eastern District of California.[384] The district court granted summary judgment in favor of the agencies, and the Council appealed to the Ninth Circuit.[385] The Ninth Circuit upheld the district court's ruling.[386] The court held: (1) the Corps' decision to issue a permit to the City to build the business park was not arbitrary and capricious; and (2) FWS' finding of "no adverse modification" did not conflict with its determination that the proposed project would destroy critical habitat of protected shrimp and grass.[387]

II. FACTUAL HISTORY

A. The Clean Water Act

The Clean Water Act was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[388] The CWA forbids the dumping of fill or dredge material into any of the country's navigable waters without the permission of the Corps.[389] But when a navigable body of water connects to a wetland, where does the Corps draw the line? For the purposes of the CWA, a navigable waterway and an adjacent wetland are one in the same, and to dump fill or dredge into either requires a permit from the Corps.[390]

A series of regulations governs when and whether the Corps may issue such a permit.[391] One regulation, a regulation which plays an important role in this case, bars the issuance of a permit if a practical, more environmentally-friendly alternative exists.[392]

B. The Endangered Species Act

[384] *Id.*; *Butte Envtl. Council v. U. S. Army Corps of Engrs*., 2009 WL 497575 (E.D. Cal. Jan. 21, 2009).
[385] *Butte Envtl. Council*,620 F.3d at 944-45.
[386] *Id.* at 945.
[387] *Id.* at 947-48.
[388] *Id.* at 939 (citing 33 U.S.C. § 1251(a) (2006)).
[389] *Id*. at 939-940 (citing 33 U.S.C. § 1344).
[390] *Id*. at 940 (citing *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985)).
[391] *Id*.
[392] *Id*. (citing 40 C.F.R. § 230.10(a) (2010)).

If the Secretaries of Commerce and the Interior determine that a species is "threatened," or "endangered," the ESA directs the appropriate secretary to designate the species' critical habitat – habitat that is essential to species' conservation and may require special management.[393] The ESA's force stands in its application: all federal agencies must ensure that their actions will not jeopardize the protected species.[394] Agencies show they have complied with the ESA by securing "a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat."[395]

C. The Case

Stillwater Creek, in Redding, contains critical habitat for several listed species, including the threatened vernal pool fairy shrimp and endangered vernal pool tadpole shrimp as well as the threatened slender Orcutt grass.[396] Despite the delicate environmental nature of the creek, the City decided in February 2005, after years of research, that a wetland alongside the creek provided the best site for a 678-acre business park.[397]

To satisfy the ESA and the CWA, the City issued a draft Environmental Impact Statement (EIS) in February 2005 to apply for a CWA permit to fill the wetlands.[398] The City required at least one 100-acre parcel to build its business park, and the Stillwater site provided the least environmentally damaging yet practicable site for the project.[399]

The Corps reviewed the draft EIS and disagreed with the City's analysis, commenting that the City's criteria had been too restrictive while selecting the site and that its efforts to

[393] *Id*. (citing 16 U.S.C. §§ 1533(a)1 & (a)(3)(A)(i), § 1532(5)(A)(i) (2006)).
[394] *Id.* (citing 16 U.S.C. § 1536(a)(2)).
[395] *Id.* at 940-41 (citing 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)).
[396] *Id*. at 941.
[397] *Id*.
[398] *Id*.
[399] *Id*.

minimize the environmental impact on the creek were insufficient.[400] The Environmental Protection Agency (EPA) agreed with the Corps, stating that the City had not "articulated a compelling need" for the 100-acre parcel.[401] It urged the City to build on several smaller ones instead.[402]

In September 2005, the City defended itself in a supplemental draft EIS.[403] The new EIS argued a disconnected business park, like that advocated by the Corps, would lack "synergy."[404] It also maintained the 100-acre parcel was necessary to cater to the medium or large businesses the City hoped to attract.[405] However, the City heeded some agency suggestions, such as modifying site's footprint and designating open space.[406]

In February 2006, the City published its final EIS.[407] In the statement, the City inserted a provision promising to mitigate the environmental effects of the business park to the extent plausible.[408] A month later, the City formally applied for a dredge and fill permit pursuant to the CWA.[409] The Corps determined the City had clearly demonstrated no other practicable sites were available and the Stillwater site presented the least environmentally damaging practicable alternative.[410] The Corps granted the City's application.[411]

To comply with the ESA, the City also had to secure the approval of the FWS.[412] In December 2006, the FWS reviewed the City's plan and issued a written biological opinion.[413]

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[400] *Id.* at 942.
[401] *Id*.
[402] *Id*.
[403] *Id*.
[404] *Id*.
[405] *Id*.
[406] *Id*.
[407] *Id*. at 943.
[408] *Id*.
[409] *Id*.
[410] *Id*.
[411] *Id*.
[412] *Id*.
[413] *Id*. at 944.

The FWS determined the Stillwater site contained 356.6 acres of critical shrimp habitat, 234.5 acres of which would be destroyed.[414] In addition, the FWS found the site contained 500 acres of Orcutt grass, 242.2 of which would be destroyed.[415] The entire project, the FWS concluded, "would contribute to a local and range-wide trend of habitat loss and degradation."[416] Nevertheless, the agency concluded "the Stillwater Business Park project, as proposed, is not likely to jeopardize the continued existence of the . . . vernal pool fairy shrimp, vernal pool tadpole shrimp, and slender Orcutt grass."[417]

D. Procedural History

In June 2008, the Council sought judicial review of the Corps' decision to permit the project and the FWS' biological opinion that allowed it to go forward under the APA.[418][38] The Council later amended its complaint to add the City as a defendant, and both sides filed motions for summary judgment.[419]

The district court granted defendants' motion, concluding the Corps was neither arbitrary nor capricious in its conclusion and the FWS' biological opinion stated a rational conclusion.[420] The Council appealed.[421]

III. ANAYLSIS

A. The United States Army Corps of Engineers Permit

The APA requires the courts to set aside only agency actions that are arbitrary or capricious.[422] The Council based its arbitrary and capricious claim on a number of arguments, all of which the Court found unpersuasive.[423]

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[414] *Id*.
[415] *Id*.
[416] *Id*.
[417] *Id*.
[418] *Id*.
[419] *Id*.
[420] *Id*. at 944-45.
[421] *Id*. at 945.

First, the Council pointed out that the Corps failed to argue that, since the project was not water dependent, a "practicable alternative that [did] not involve special aquatic sites" was presumed to exist under federal regulations "unless clearly demonstrated otherwise."[424] The court noted the Corps had acknowledged the lack of water dependency but also noted the City had reviewed more than a dozen alternative sites.[425] Because the City had clearly demonstrated that none of the alternatives were practicable, the Corps had "applied the proper presumption and found that it had been rebutted under the appropriate standard."[426]

Second, the Council argued the Corps' decision to issue a permit pursuant to the CWA was inconsistent with its earlier criticism of the City's EIS.[427] However, with its open space designations and its modified footprint, the City reduced its "direct wetland impacts" from 7.13 acres to 6.50 acres.[428] This reduced impact, the court noted, followed years of investigation, and was proper because "[a]gencies are entitled to change their minds, and the Corps followed the proper procedure in doing so here."[429]

Next, the Council argued the Corps relied on the City's information to determine the project's purpose and the size of the needed parcels.[430] To the contrary, the court noted, the Corps expressed skepticism that the City needed a 100-acre parcel until the City demonstrated the parcel was necessary to meet the needs of interested businesses and to establish the synergy the City hoped the large parcel would create.[431] Although the Corps ultimately accepted the

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[422] *Id*. (citing 5 U.S.C. § 706(2)(A)).
[423] *Id*.
[424] *Id*. (citing 40 C.F.R. § 230.10(a)(3)).
[425] *Id*.
[426] *Id*.
[427] *Id*.
[428] *Id*.
[429] *Id*. at 946 (citing *Nat'l Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658-59 (2007)).
[430] *Id*.
[431] *Id*.

City's purpose, "'the Corps ha[d] a duty to consider the applicant's purpose,' where, as here, that purpose [was] 'genuine and legitimate.'"[432]

Fourth, the Council argued the City acted too quickly in dismissing the Corps' suggestion for a site – known as the Mitchell site – as a practicable alternative.[433] When the City started looking for property to build the park in 2001, the Mitchell price was listed for about $2.6 million.[434] However, by 2006, the price had nearly quintupled to $12 million.[435] The Corps reviewed the 2006 price rather than the 2001 price when evaluating the property, a review the Council claimed was an error.[436] However, the court noted the Corps had not relied on the increased price, but rather the lack of continuity with property already under the City's ownership, the topography and geology, and the insufficient size of the parcel to make its decision.[437]

Lastly, the Council argued the Corps improperly relied on the City's mitigation plan.[438] Specifically, the Council argued that off-site mitigation allowed the City to shirk its responsibility to the most environmentally-friendly practicable alternative.[439] However, the court noted that nothing indicated that the City's mitigation plan replaced its obligation to secure the most environmentally-friendly site; instead, the mitigation added to the City's original responsibility.[440]

For these five reasons, the court held the Corps had "stated a rational connection between the facts found and the conclusion that the proposed Stillwater site was the least environmentally

[432] *Id*.
[433] *Id*. at 943, 946.
[434] *Id*. at 946.
[435] *Id*.
[436] *Id*.
[437] *Id*.
[438] *Id*.
[439] *Id*.
[440] *Id*. at 946-47.

damaging practicable alternative."[441] Therefore, the decision to issue a permit was neither arbitrary nor capricious, and the court deferred to the agency's judgment.[442]

B. The United States Fish and Wildlife Service Opinion

The Council next challenged the FWS' biological opinion that allowed the project to go forward.[443] Alleging the FWS applied an improper definition of "adverse modification" under the ESA, the Council argued FWS' decision was also arbitrary and capricious.[444] The Ninth Circuit's interpretation of the "adverse modification" standard arises from *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*.[445] In *Gifford Pinchot*, the court held that adverse modification occurs when the value of critical habitat for the survival or recovery of a protected species is appreciably diminished.[446] The Council argued the FWS had applied a definition of adverse modification inconsistent with *Gifford,* but the court noted the biological opinion expressly stated the FWS had applied *Gifford* and nothing in the opinion suggested otherwise.[447]

The Council next argued the FWS' "no adverse modification" finding conflicted with its determination that the Stillwater project would destroy 234.5 acres of endangered shrimp habitat and 242.2 acres of endangered grass habitat.[448] Despite the acreage, the court ruled the lost habitat did not constitute an appreciable diminishment of the critical habitat.[449] The court cited FWS' handbook in noting that adverse modification only takes place when there are "significant

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[441] *Id.* at 947.
[442] *Id*.
[443] *Id*.
[444] *Id*.
[445] 378 F.3d 1059 (9th Cir. 2004).
[446] *Id.* at 1070.
[447] *Butte Envtl. Council*,620 F.3d at 947.
[448] *Id*. at 947-948.
[449] *Id*. at 948.

adverse effects throughout a species' range."[450] The Council maintained the FWS' focus on large-scale impact masked the localized impact, but without evidence that some localized risk was improperly hidden by use of large scale analysis, the court again deferred to the agency's decision.[451]

Lastly, the Council argued the FWS had failed to address the rate of loss of critical habitat.[452] In dismissing the argument, the court noted neither the ESA nor its regulations require the FWS to calculate a rate of loss.[453] Finding none of the Council's arguments convincing, the Ninth Circuit affirmed the district court's decision.[454]

IV. CONCLUSION

Butte Environmental Council v. United States Army Corps of Engineers underscores a weakness of the ESA. In its final challenge, the Council asserted that the FWS failed to address the rate of critical habitat loss spurred by the construction of the City's business park.[455] The court noted the ESA does not require the FWS to calculate such a loss but rather, "[the ESA] requires[s] only that the FWS evaluate 'the current status of the listed species or critical habitat,' 'the effects of the action,' and the 'cumulative effects on the listed species or critical habitat.'"[456]

The Council also asserted the FWS acted improperly by "[f]ocusing solely on a vast scale" which, "can mask multiple site-specific impacts that, when aggregated, do pose a significant risk to a species."[457] In short, the Council seemed to allege the ESA requires only that the FWS evaluate the *current* status of a local protected species through a national paradigm.

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[450] *Id*. (quoting U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* 4-34 (19(8)).
[451] *Id*. (citing *Gifford Pinchot*, 378 F.3d at 1075).
[452] *Id*.
[453] *Id*.
[454] *Id*.
[455] *Id*.
[456] *Id*. (quoting 50 C.F.R. § 402.14(g)(2)-(3)).
[457] *Id*. (citing *Gifford Pinchot*, 378 F.3d at 1075).

The FWS concluded, properly, that the loss of local critical habitat would not substantially affect the status of the either protected species at issue in the case at bar, despite noting that the project "would contribute to a local and range-wide trend of habitat loss and degradation."[458] However, the next time the FWS evaluates the status of the vernal pool shrimp or the Orcutt grass, the agency will evaluate the status of species as they stand at that current time, regardless of the fact that 500 acres of the protected species were destroyed when the City built its business park.

The *Gifford Pinchot* court noted that, "it is logical and inevitable that a species requires more critical habitat for recovery than is necessary for the species survival," and therefore, adverse modification may occur if appreciable diminishment of habitat for the survival *or* the recovery of a listed species occurs.[459] The ESA does not fail by allowing a species to fall through the cracks – *Gifford Pinchot* ensures that impossibility – but it does slow the pace of a recovery of a protected species by allowing an agency to disregard the rate at which a certain species is being destroyed.

What is missing in this situation – and what the Council, in effect, pointed out – is a baseline of the species' population. The basely ne population would stand regardless of whether a city destroyed 500 acres of critical habitat with a business park and in effect, provide an agency with a gauge with which to calculate a species' diminishment. But if this weakness is to improve, it falls to Congress, not the courts, to improve it.

[458] *Id.* at 944.
[459] 378 F.3d at 1069-70 (emphasis added).