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LAND USE & NATURAL RESOURCES

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A BREATH OF FRESH AIR – FEDERAL COURT REJECTS LAWSUIT AGAINST WETLANDS FILL PERMIT

The Ninth Circuit Court of Appeals has upheld a wetlands permit issued by the Army Corps of Engineers (the "Corps") for a 678-acre business park in Redding, California. In its opinion, the Court made clear that the *applicant's purpose* in constructing a project should be entitled to deference in judicial challenges.

In considering whether to issue a wetlands fill permit under Section 404 of the Clean Water Act, the Corps must consider whether there are practicable alternatives to the proposed project that would result in fewer impacts to the aquatic environment. If such an alternative exists, the Corps cannot issue the requested permit. Moreover, in most cases there is a heavy burden of proof on the applicant to demonstrate that no such alternative exists. That is, under the law, the applicant must "prove the negative."

In this case, *Butte Environmental Council v. United States Army Corps of Engineers*, the opponents argued that the project could be divided into pieces and built on multiple sites with fewer impacts to wetlands. The Corps, however, agreed with the applicant's contention that the project – a regional business park – should be built on a single, contiguous site. In rejecting a third-party challenge to the wetlands permit, the Court (relying on a prior Ninth Circuit decision) held that "'the Corps has a duty to consider the applicant's purpose,' where, as here, that purpose is 'genuine and legitimate.'" The Court found that the applicant had met its burden of proof, that alternative sites were impracticable, and that the Corps had acted legally in issuing its permit.

In upholding the Corps' issuance of the wetlands permit, the Court commented favorably on the applicant's willingness to minimize impacts by reducing the project's "footprint" as requested by the Corps, and ruled that the Corps was free to shift from a negative view of the project to a favorable view in light of the applicant's agreement to reduce impacts. The Court also held that impacts on critical habitat – as authorized by the U.S. Fish and Wildlife Service (USFWS) – were acceptable because they would impact "only a very small percentage" of the total critical habitat designated for the species affected (i.e., fairy shrimp and slender Orcutt grass). Notably, the Court side-stepped the opponent's attempt to expand the reach of a decades-old Second Circuit decision under which, it argued, the wetlands permit was illegal because a feasible off-site alternative existed when the applicant "entered the market" to acquire development property.

Butte Environmental Council is a noteworthy advance in the law surrounding the Corps' wetlands regulatory program and the Endangered Species Act. Because the Court's holdings are based upon the established principle of judicial deference to agency decisions, the ruling should – at least from a legal standpoint – strengthen the resolve of the Corps and USFWS to act decisively on projects even in the face of third-party challenge.

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