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Ninth Circuit Provides Guidance on Triggers for Environmental Impact Statements

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The Ninth Circuit recently issued its decision in *White Tanks Concerned Citizens, Inc. v. Strock*, Case No. 07-15659, a case involving development of the proposed Festival Ranch project near Phoenix, Arizona. *White Tanks* provides guidance on the Army Corps of Engineers' scope of environmental analysis under the National Environmental Policy Act for wetland fill permits issued in connection with larger, otherwise non-federal development projects. It also offers guidance on whether the Corps should prepare a full-scale environmental impact statement under NEPA for projects that have become "federalized" by virtue of that expanded scope of analysis.

Sometimes referred to as the "small federal handle" problem, *White Tanks* addresses the issue of whether the Corps' issuance of a Clean Water Act Section 404 wetland fill permit for a project requires the Corps to evaluate impacts related to the entirety of that project, not just impacts related to the fill of "waters of the United States" (i.e., waters subject to the Corps' Clean Water Act jurisdiction), under NEPA. The Corps' Regulations provide some guidance on this issue, essentially requiring the Corps to evaluate environmental impacts related to those portions of the project over which it has "sufficient control and responsibility." The question is, at what point does the Corps have "sufficient control and responsibility" requiring it to expand its NEPA analysis beyond the Corps' permit action?

The federal Circuit Courts of Appeals have struggled with this question. Earlier this year, the Fourth Circuit issued its decision in *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, a case involving the issuance of Section 404 permits in connection with

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certain mountaintop removal coal mining projects in West Virginia. The court upheld the Corps' decision to restrict its NEPA review to impacts from the fill of jurisdictional waters, rather than impacts from the entirety of the mining operations. This holding was based in part on the court's determination that the Corps lacked "sufficient control and responsibility" because a West Virginia state agency retained substantial regulatory control over all other aspects of those operations.

Within the past ten years, the Ninth Circuit has contributed two key cases to this body of law: *Wetlands Action Network v. U.S. Army Corps of Engineers*, decided in 2000; and *Save Our Sonoran v. Flowers*, decided in 2005. For projects involving Corps permits in the Ninth Circuit, the *White Tanks* decision offers guidance on how to apply these two cases to evaluate whether the Corps has "sufficient control and responsibility" over aspects of a project that would otherwise be beyond its jurisdiction.

White Tanks involved a master planned development designed to accommodate approximately 60,000 people. The site consists of 10,105 acres traversed by approximately 787 acres of washes, 643 acres of which would not be disturbed by the development. The remaining 144 acres of washes are dispersed throughout the development site, and the proposed development would fill 26.8 of those acres. Because the 26.8 acres of washes were considered "waters of the United States," the project applicant sought a Section 404 permit to place fill in those washes in order to build the larger development. The Corps restricted its scope of environmental analysis to the washes themselves and certain upland areas directly affected by the fill activity. After concluding that the fill would not cause significant environmental impacts with respect to those areas, the Corps issued an Environmental Assessment/Finding of No Significant Impact, rather than an EIS, under NEPA for the issuance of the permit.

A non-profit organization challenged the Corps' decision, arguing that the Corps should have prepared an EIS and analyzed the environmental impacts related to the entire Festival Ranch project. In evaluating this argument, the court observed that *Wetlands Action Network* and *Save Our Sonoran* represent two ends of a spectrum. On one end – characterized by *Wetlands Action Network* – the Corps may limit its analysis to jurisdictional waters if those waters are concentrated in certain areas, making it easy to build around them, so that "substantial development" can go forward without a Section 404 permit. On the other end – characterized by *Save Our Sonoran* – the Corps must include in its analysis the effects of the entire development if the jurisdictional waters are dispersed throughout the site, so that any construction on the site would be impossible without affecting those waters, and a Section 404 permit would be required for any such construction.

The court found that the Festival Ranch project is closer to the *Save Our Sonoran* end of the spectrum. Like *Save Our Sonoran*, the washes are dispersed throughout the Festival Ranch project area in such a way that, as a practical matter, no large-scale development could take place without filling the washes. As such, the court held that the entire project, not just the area affected by the wetland fill permit, was within the Corps' purview. The court found particularly persuasive evidence in the administrative record, including the developer's own application for the Section 404 permit, showing the project could not go forward as planned without the permit.

White Tanks is therefore significant because it provides practical guidance on how to apply *Wetlands Action Network* and *Save Our Sonoran* to "small federal handle" situations involving large-scale projects that require a Corps permit for the fill of jurisdictional waters. The test under *White Tanks* is both locational (where are the jurisdictional waters



located and in what density?) and logistical (to what extent can development go forward without impacting those waters?). Notably, the court clarified that the operative question is not how many acres of jurisdictional waters are on the site, but rather whether in fact those waters will be affected and whether they must be affected to fulfill the project's goals. These are the kinds of factors the Corps and permit applicants should keep in mind when confronting a potential "small federal handle" issue involving the Corps' issuance of a fill permit.

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