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Environmental Law - Resource Investments, Inc. v. U.S. Army Corps of Engineers

Marcelin E. Keever

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ENVIRONMENTAL LAW

RESOURCE INVESTMENTS, INC. v. U.S. ARMY CORPS OF ENGINEERS

151 F. 3d 1162 (9th Cir. 1998).

I. INTRODUCTION

In *Resource Investments Inc. v. United States Army Corps of Engineers*,¹ the United States Court of Appeals for the Ninth Circuit considered whether section 404 of the Clean Water Act (CWA)² authorized the United States Army Corps of Engineers (Corps) to require a landowner to obtain a dredge and fill permit from the Corps before constructing a municipal solid waste landfill on a wetlands site.³ The Court held that when a proposed project affecting a wetlands area is a solid waste landfill, the Environmental Protection Agency (EPA), rather than the Corps, will have permit authority under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6941 et seq.) (RCRA).⁴ If the project that will affect a wetlands area is not a solid waste landfill and the project involves the discharge of dredged or fill material, the Corps will have permit authority under section 404 of the CWA.⁵

1. 151 F. 3d 1162 (9th Cir. 1998). The appeal from the United States District Court for the Western District of Washington was argued and submitted on May 4, 1998, before Circuit Judge David R. Thompson, Circuit Judge A. Wallace Tashima, and District Judge Tom Stagg, Senior United States District Judge for the Western District of Louisiana, sitting by designation. The decision was filed on July 27, 1998. Judge Thompson authored the opinion.

2. See 33 U.S.C. § 1344 (1998). The Clean Water Act prohibits the discharge of dredge or fill material into navigable waters without a permit. See *id.*

3. See *Resource Investments Inc. v. U.S. Army Corps of Engineers*, 151 F. 3d 1162, 1163 (9th Cir. 1998).

4. See *Resource Investments*, 151 F. 3d at 1169.

5. See *id.*

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II. FACTS AND PROCEDURAL HISTORY

Resource Investments Inc. (RII) sought to construct and operate a municipal solid waste landfill on a 320-acre site in Pierce County, Washington.⁶ The landfill would occupy 168 acres of the 320-acre site and require clearing, excavating, filling, and grading of approximately 21.6 acres of the site's 70 acres of wetlands.⁷

On August 8, 1990, RII filed an application with the Corps for a permit as mandated under 404 of the CWA to discharge "dredged or fill material" into the navigable waters of the United States.⁸ The Corps denied RII's permit application because RII had failed to demonstrate the unavailability of practicable alternatives for waste disposal that were less environmentally damaging.⁹ The United States District Court for the Western District of Washington affirmed the Corps' denial of RII's application for a permit on the ground that the Corps' decision was not arbitrary, capricious, contrary to law, or an abuse of discretion.¹⁰ RII appealed the decision to the Ninth Circuit.¹¹

III. THE COURT'S ANALYSIS

RII contended that the Corps did not have permitting authority under section 404 of the CWA because the authority to regulate solid waste landfills is vested with the EPA and not the Corps.¹² To resolve the conflict between the agencies, the Ninth Circuit interpreted both the CWA and the RCRA.¹³

6. See *Resource Investments Inc. v. U.S. Army Corps of Engineers*, 151 F. 3d 1162, 1164 (9th Cir. 1998).

7. See *id.*

8. See *id.* See 33 U.S.C. § 1344 (1998).

9. See *Resource Investments*, 151 F. 3d at 1165.

10. See *id.*

11. See *id.*

12. See *Resource Investments Inc. v. U.S. Army Corps of Engineers*, 151 F. 3d 1162, 1165 (9th Cir. 1998).

13. See *id.* The court must read the statutes to give effect to each, if possible, while preserving their sense and purpose. See *id.* (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)). An agency's construction of a statute is normally entitled to deference. See *id.* (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985)).

A. THE CLEAN WATER ACT

The Clean Water Act prohibits discharging pollutants into the navigable waters of the United States without a National Pollution Discharge Elimination System (NPDES) permit issued by the EPA.¹⁴ Under section 404 of the CWA, discharging dredged or fill material into navigable waters without a permit from the Corps is prohibited.¹⁵ EPA promulgates regulations to serve as guidelines for the Corps to follow in reviewing dredge or fill permit applications.¹⁶ If the Corps finds that the application complies with the guidelines, it grants the permit unless the district engineer determines that the permit is contrary to the public interest.¹⁷

B. THE RESOURCE CONSERVATION AND RECOVERY ACT

Under RCRA, the EPA has authority to issue permits for the disposal of solid waste, but the statute also allows the states to substitute their own permit program for the federal program if the state program is approved by the EPA.¹⁸ EPA promulgates regulations (Subtitle D regulations), providing minimum federal criteria with which all solid waste landfills

This deference does not extend to an agency litigating a position, which is wholly unsupported by regulations, rulings, or administrative practice. *See id.* *See also* *Ashoff v. City of Ukiah*, 130 F. 3d 409, 411 (9th Cir. 1997) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)).

14. *See Resource Investments*, 151 F. 3d at 1165. *See also* 33 U.S.C. § 1342 (1998).

15. *See Resource Investments*, 151 F. 3d at 1165-66. *See also* 33 U.S.C. § 1344 (1998). Dredged material is defined under the Corps' regulations as "material that is excavated or dredged from the waters of the United States." *See Resource Investments*, 151 F. 3d at 1166. *See also* 33 C.F.R. § 323.2(c). The term fill material is defined under the Corps' regulations as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." *See Resource Investments*, 151 F. 3d at 1166. *See also* 33 C.F.R. § 323.2(e). The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act. *See id.*

16. *See Resource Investments*, 151 F. 3d at 1166. *See also* 33 U.S.C. § 1344(b) (1998).

17. *See Resource Investments*, 151 F. 3d at 1167. *See also* 33 C.F.R. § 320.4(a)(1). The public interest review evaluates the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest, and it includes consideration of the proposed activity on wetlands. *See Resource Investments*, 151 F. 3d at 1167. *See also* 33 C.F.R. § 320.4(a)(3).

18. *See Resource Investments*, 151 F. 3d at 1167. *See also* *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 611 (1992).

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must comply.¹⁹ RCRA requires each state to adopt and implement a permit program that ensures compliance with these minimum federal criteria.²⁰ Under EPA's regulations, wetlands are given strong protection against degradation by solid waste landfills.²¹ To construct a municipal solid waste landfill on a wetlands area, an owner must demonstrate to the state director compliance with certain requirements.²² Under the State of Washington's municipal solid waste landfill permit program,²³ an owner of a proposed municipal solid waste landfill must specifically comply with EPA Subtitle D regulations.²⁴ The Tacoma-Pierce County Health Department certified that RII complied with the wetlands requirements under Washington Administrative Code § 173-351-130(4)(a).²⁵

C. RESOURCE INVESTMENTS, INC.'S PERMIT APPLICATION

The Ninth Circuit held that the Corps lacked the authority, under section 404 of the CWA, to require RII to obtain a permit

19. See *Resource Investments*, 151 F. 3d at 1167. See also 40 C.F.R. §§ 258.1-258.75.

20. See *Resource Investments*, 151 F. 3d at 1167. See also 42 U.S.C. § 6943 (1998); 40 C.F.R. § 258.1(a).

21. See *Resource Investments*, 151 F. 3d at 1167.

22. See *id.* First, the owner must clearly rebut the presumption that a practicable alternative to the proposed landfill is available that does not involve wetlands. See *id.* See also 40 C.F.R. § 258.12(a)(1). Second, the owner must show that the construction or operation of the landfill will not cause or contribute to violations of any applicable state water quality standards or prohibition, jeopardize the continued existence of endangered or threatened species or critical habitats, or violate any requirement for the protection of a marine sanctuary. See *Resource Investments*, 151 F. 3d at 1167. See also 40 C.F.R. § 258.12(a)(2). Third, the owner must demonstrate that the landfill will not cause or contribute to significant degradation of wetlands. See *Resource Investments*, 151 F. 3d at 1167. See also 40 C.F.R. § 258.12(a)(3). Fourth, the owner must demonstrate that steps have been taken to achieve no net loss of wetlands by first avoiding impacts to the maximum extent practicable. See *Resource Investments*, 151 F. 3d at 1167. See also 40 C.F.R. § 258.12(a)(4). Finally, the owner must offset remaining avoidable wetlands impacts through all appropriate and practicable compensatory mitigation actions. See *id.*

23. See *Resource Investments*, 151 F. 3d at 1168. The EPA approved the State of Washington's municipal solid waste landfill permit program in 1994. See *id.* See also 59 Fed. Reg. 15,203 (1994).

24. See *Resource Investments*, 151 F. 3d at 1168. See also Wash. Admin. Code § 173-351-130(4)(a).

25. See *Resource Investments*, 151 F. 3d at 1168. The State of Washington has delegated its permit authority in Pierce County to the Tacoma-Pierce County Health Department. See *id.* See also Wash. Admin. Code § 173-351-720(1)(f).

from the Corps before constructing the solid waste landfill.²⁶ The Ninth Circuit gave a number of reasons for its decision. First, municipal solid waste does not fall within the definition of either dredged or fill material.²⁷ The solid waste at issue was not “dredged material” because it was not “material that is excavated or dredged from waters of the United States.”²⁸ The solid waste was not “fill material” because it is not “material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody.”²⁹ Solid waste was, in fact, a listed exception to the definition of fill material.³⁰ Second, the court reasoned that the siting, design, and construction of a solid waste landfill on a wetlands area was specifically regulated under the RCRA by EPA and the states through EPA approved solid waste permit programs.³¹

Therefore, the court concluded EPA has sole jurisdiction under RCRA over any solid waste permit program.³² If EPA did not have sole jurisdiction, the court reasoned, both the Corps and the EPA, or the state through its EPA approved program, would perform a wetlands impact determination, using the same criteria, with potentially inconsistent results.³³ The resulting regulatory overlap would violate the Corps own regulations, which provide that federal and state regulatory programs should compliment rather than duplicate one other.³⁴ Section 404 of the CWA and the applicable provisions of RCRA can be harmonized to give effect to each while preserving their sense and purpose.³⁵ Thus the Ninth Circuit reversed the district court’s order upholding the Corps’ decision to deny the

26. See *Resource Investments*, 151 F. 3d at 1168.

27. See *id.* See also *supra* note 14.

28. See *Resource Investments*, 151 F. 3d at 1168. See also 33 C.F.R. § 323.2(c).

29. *Resource Investments*, 151 F. 3d at 1168. See also 33 C.F.R. §323.2(e).

30. See *Resource Investments*, 151 F. 3d at 1168. The term “fill material” does not include any pollutant discharged into the water primarily to dispose of waste, an activity that is regulated under section 402 of the CWA. See *id.*

31. See *Resource Investments*, 151 F. 3d at 1168-69. See also *supra* notes 19, 24 & 25.

32. See *Resource Investments*, 151 F. 3d at 1169.

33. See *id.*

34. See *id.*

35. See *id.*

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permit and remanded the case with instructions to vacate the Corps' decision.³⁶

IV. IMPLICATIONS OF DECISION

The Corps section 404 guidelines for disposal of dredged or fill material are comparable to the EPA's Subtitle D regulations.³⁷ Since both the Corps and the EPA could perform the same wetlands impact determination with potentially inconsistent results, the court had to decide which agency should take the responsibility for the oversight of the disposal of solid waste on wetlands areas. The EPA has many solid waste responsibilities under its RCRA programs, and has developed expertise in an area where the Corps has limited knowledge.³⁸ Since the EPA has historically dealt with the disposal of solid waste and the Corps has not, it is in the best interests of the Government to have a single agency responsible for the issuance of section 404 permits when the filling of wetlands will result in a landfill.³⁹ The Ninth Circuit harmonized the CWA and RCRA, holding that when a project affecting a wetlands area is a solid waste landfill the EPA will have permit authority.⁴⁰ This harmonization is consistent with the sense of the CWA that discharges of solid waste material are beyond the scope of section 404, and avoids unnecessary duplication of federal and state efforts in the area of wetlands protection.⁴¹

The Corps lacks authority under section 404 of the CWA to require a landowner to obtain a dredge and fill permit from the Corps before constructing a municipal solid waste landfill on a

36. *See id.*

37. *See* 40 C.F.R. § 230.10 (1999). *See also supra* notes 19-22 and accompanying text.

38. *See* *Resource Investments Inc. v. U.S. Army Corps of Engineers*, 151 F. 3d 1162, 1169 (9th Cir. 1998).

39. *See id.* As evidence of this the EPA and the Corps entered into a Memorandum of Agreement in 1986 which provided that when the EPA promulgates its final rules regarding which agency has jurisdiction over the disposal of solid waste, which it did in 1991 (codified at 40 C.F.R. 258.1 - 258.75), the EPA has sole authority over the program. *See id.* *See also* 51 Fed. Reg. 8871 (1986).

40. *See* *Resource Investments*, 151 F. 3d at 1169.

41. *See id.* *See also* 42 Fed. Reg. 37,122 (1977).

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wetlands site.⁴² The construction of a municipal solid waste landfill on a wetlands site is regulated by the EPA and states with solid waste permit programs approved by the EPA under RCRA.⁴³

*Marcelin E. Keever**

42. *See Resource Investments*, 151 F. 3d at 1169.

43. *See id.*

* Golden Gate University School of Law, Class of 2000.