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

Jesse Froehling

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 Env'tl. Council v. U. S. Army Corps of Engrs.*, 2009 WL 497575 (E.D. Cal. Jan. 21, 2009).

³⁸⁵ *Butte Env'tl. 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

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. ANALYSIS

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

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

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

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.

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 baseline 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).