



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Water Resource Development Act: Federal Court Addresses Whether Corps Imposed Improper Mitigation Requirements for Removal of Borrow Material

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Co-Author: Rachel Hildebrand

A federal district court (Eastern District of Louisiana) addressed a dispute involving mitigation requirements imposed by the Army Corps of Engineers ("Corps") on a tract of land owned by White Oak Realty ("White Oak") in Southwest Louisiana. See *White Oak Realty, LLC, v. U.S. Army Corp of Engineers*, 2016 WL 4799101.

The court was required to resolve questions involving the Water Resource Development Act of 2007 ("WRDA").

The Corps undertook projects to use soil and clay ("borrow material") to reinforce levees and floodwalls as a result of Hurricanes Katrina and Rita. These projects apparently generated what is described as an "unprecedented" demand for borrow material. Consequently, the Corps instituted a "contractor furnished borrow program" ("CFBP").

The CFBP provided landowners the opportunity to have their land:

1. qualified as suitable sources for borrow material; and
2. placed on a list for selection as supply sources by contractors working on the levee project.

A portion of White Oak's property was qualified in 2010 by the Corps to be used as borrow material. However, the qualification included a stipulation that, because the excavation of borrow material would cause "unavoidable impacts" to bottomland hardwood ("BLH") forests on the property, mitigation would be required. Further, such mitigation could occur solely through the purchase of mitigation bank credits.

White Oak Realty brought suit against the Corps arguing that the WRDA did not:

1. require mitigation;
2. authorize the Corps to mandate the purchase of mitigation credits as the sole form of compensatory mitigation; and that
3. the mitigation and purchase requirements constituted a Fifth Amendment Taking.

The court established as a preliminary matter that it did have jurisdiction to hear White Oak's claims, despite the Corps' argument that its mitigation requirement was not a "final agency action".

Consequently, it assessed White Oak's first two claims regarding the Mitigation and Purchase Requirements. To do so the court followed the two-step Chevron process for judicial review of agency action. Chevron directs that a court first ask whether Congress has directly spoken to the precise question at issue. If the answer is no and the statute is ambiguous, the question then becomes whether the agency's action is based on a permissible construction of the statute.

White Oak argued that the WRDA was intended to address only those environmental impacts that directly resulted from a water resource project, not those that resulted indirectly. If excavating borrow material had only an indirect impact, then no mitigation was required. In addition, White Oak argued that, because the WRDA requires the Corps to assess potential environmental impacts and plan mitigation in advance of a project, and because the project at issue did not allow the Corps to mitigate in advance, it was impossible to comply with the WRDA's advance planning requirement.

The Corps responded:

1. the WRDA unambiguously requires it to mitigate for losses resulting from any water resources project, without differentiating between "direct" and "indirect" impacts; and
2. its determination that the borrow sites must be mitigated was reasonably and rationally based

In assessing both parties' arguments regarding the first Chevron step (whether Congress has spoken directly to an issue), the court held that the WRDA is ambiguous as to whether the Corps can require mitigation for the loss of BLH forests on property from which contractor-supplied borrow material is excavated. Accordingly, the court moved to the second Chevron step (whether an agency's answer is based on a permissible construction of a statute), and held that the Corps' decision to require mitigation was based on a reasonable and permissible construction of the WRDA.

As to whether the Corps could require the purchase of wetland mitigation credits as the sole option for satisfying the Mitigation Requirement, the parties agreed that there were no upland BLH mitigations credits available to purchase in the relevant region. Therefore, in-kind mitigation was not possible.

The Corps further posited that consideration of individual mitigation projects would be less efficient, timely, and less effective than requiring the purchase of credits. The agency deemed this particularly true in light of the expedited process that Hurricane Katrina necessitated. Therefore, the court held that the Corps' purchase requirement was not arbitrary or capricious, but instead was meant to reduce risk and uncertainty.

White Oak also argued that the Mitigation Requirement conflicted with the WRDA's budget requirements, because the Corps had shifted the costs of mitigation to private contractors. The court agreed that the ultimate responsibility for mitigation lies with the Corps. However, it rejected White Oak's argument because despite the "initial onus" being placed on the landowner or contractor, the Corps had to eventually foot the bill.

Finally, White Oak argued that the Corps' actions were an unconstitutional Fifth Amendment government taking of private property for public use without just compensation. It asked for an injunction allowing White Oak to forgo the Corps' Mitigation Requirement. The court rejected this argument. It held:

1. a per se takings analysis did not apply to the Corps' contracts with private entities; and
2. White Oak's removal of trees on its land after approval for use in the borrow program was a unilateral act, not a taking.

The court granted summary judgment in favor of the Corps ruling that:

1. the court had jurisdiction to hear because a final action had been implemented;
2. the mitigation and purchase requirements were permitted under the WRDA;
3. the WRDA's budget requirements had not been violated; and
4. the actions of the Corps were not unconstitutional takings.

[A copy of the decision can be downloaded here.](#)