

Jetty Project/Nationwide Permit 3: Federal District Court Addresses U.S. Corps of Engineers Applicability Determination



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

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Co-Author: Hayden Redd

On May 9th, the United States District Court for the District of Arizona (“Court”) addressed a challenge by Plaintiffs, Richard and Janine Plump (“Plaintiffs”) to a United States Army Corps of Engineers (“Corps”) determination that a jetty project could be undertaken pursuant to a particular Nationwide Permit. See *Plump v. Graham* 2017 WL 1862140.

The Plaintiffs filed suit under the Administrative Procedure Act (“APA”) to seek judicial review of the Corps determination that Nationwide Permit No. 3 (“NWP 3”) applied to the Graham’s anticipated new jetty.

The Plaintiffs argued that the new jetty raised six major reasons for concern:

- 1) the new jetty negatively impacted navigation for boaters;
- 2) the new jetty negatively impacted aquatic life movements;
- 3) the new jetty negatively impacted migratory bird breeding areas;
- 4) the new jetty is made out of concrete rather than natural sources;
- 5) the new jetty negatively impacted water flows; and
- 6) the Grahams failed to revegetate the new jetty.

The Clean Water Act (“CWA”) and the Rivers and Harbor Act of 1899 provide the Corps the authority to issue permits for the discharge of fill or other materials into the navigable waters of the United States. NWPs are a type of general permit issued by the Corps. They are designed to regulate with little, if any, delay or paperwork certain activities having more minor impacts on navigable waters of the United States.

The Corps has an obligation to verify that a proposed activity is within the scope of the relevant NWP.

NWP 3 is a NWP that authorizes the “repair, rehabilitation, or replacement” of any previously authorized and currently serviceable fill or structure, “provided that the structure or fill is not to be put to uses differing from those specified or contemplated for it in the original permit or the most recently authorized modification.” Further, “[m]inor deviations in the structure’s configuration or filled area, including those due to changes in materials, construction techniques, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized.”

The Court held that the Plaintiffs failed to present evidence to support a finding that the Corps determination regarding the change in the new jetty's size was clearly erroneous. The Corps determination that a change in size and the slight shift in the new jetty's footprint constituted a "minor deviation" and posed no bar to the NWP 3 permit was held to be within its discretion. In *Snoqualmie Valley Pres. All v. U.S. Army Corps of Engineers*, (9th Circuit) is cited for the proposition that these types of discretionary decisions may only be overturned if the determination was "plainly erroneous or inconsistent with the regulation." 683 F.3d 1155, 1161 (9th Cir. 2012).

The Plaintiffs alleged the Corps violated the APA because it failed to explain why the minor deviations were necessary. The Court again quoted the Ninth Circuit opinion in *Snoqualmie Valley Pres. All*, "language in the regulatory history suggests that a general 'public safety' rationale suffices to bring a replacement project with minor deviations under this nationwide permit." 683 F.3d at 1161-62. The Court determined that the Corps weighed public safety concerns during the permit approval process and determined the public safety rationale justified the issuance of the NWP 3.

The Court also held that the Corps adequately evaluated the Graham's permit application. It reasoned that once the Corps verified compliance with NWP 3, it absolved any duty to perform an independent, full scale review of the new jetty. The purpose of the permit process is to enable to Corps to quickly reach determinations regarding activities that will have minimal environmental impacts. See *Snoqualmie Valley Pres All*, 683 F.3d at 1163. Thus, requiring an elaborate analysis of the applicable regulations and was deemed to defeat the purpose of the NWP.

The Court also addressed the fact that the Grahams' property was located on a floodplain. The Corps was held to have adequately considered Federal Emergency Management Agency ("FEMA") regulations and Executive Orders 11988 and 11990. Executive Orders 11988 and 11990 require that every agency of the United States government consider the potential implications of their actions if they interfere with land on a floodplain.

FEMA requires federal executive agencies to "respond to a number of floodplain management and wetland protection responsibilities before carrying out any of their activities, including the provision of Federal financial and technical assistance." Further, General Condition 10 ("GC 10") of the Reissuance of Nationwide Permits specifically considers the potential impact of the NWPs on floodplains. The relevant quoted language of GC 10 is, "[t]he activity must comply with applicable FEMA-approved state or local floodplain management requirements." Thus, it was not the Corps' responsibility to ensure that the Grahams comply with FEMA's regulations or the general conditions contained in NWP 3 but rather the more appropriate authority for floodplain management is state and local governments.

[A copy of the Order can be found here.](#)