IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

COALITION TO PRESERVE MC INTIRE PARK, et. al.; Plaintiffs;	:	
v.	:	Civil No. 3:11-cv-00041
UNITED STATES ARMY CORPS OF ENGINEERS, et. al., Defendants.	:	

RESPONSE OF DEFENDANT CORPS OF ENGINEERS TO PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

COMES NOW the defendant U.S. Army Corps of Engineers and states the following as its response to the plaintiffs' application for a temporary restraining order (TRO) and preliminary injunction:

1. At issue in the plaintiffs' application is enjoining (1) "the authorization issued by the United States Army Corps of Engineers on May 25, 2011 to the Virginia Department of Transportation (VDOT) under §404e of the Clean Water Act, 33 U.S.C. §1344e, and (2) prohibiting the defendant VDOT from constructing McIntire Road Extended pursuant to that authorization". See "Plaintiff's Application For A Temporary restraining order and / or A Preliminary Injunction" p.1. The plaintiffs' law suit and this application are premised on the Corps of Engineers' authorization of VDOT to construct a box culvert in an unnamed small

tributary of Schenks Branch.[1] In their complaint, the plaintiffs allege that the Corps of Engineers violated both the Clean Water Act, 33 U.S.C. §1344, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332 by issuing this permit to VDOT. This court reviews the Corps of Engineers NEPA and Clean Water Act decisions pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §551 *et. seq.*, using an arbitrary or capricious standard. Ohio Valley Environmental Coalition v. Aracoma Coal Co., 556 F.3d 177, 189 (4th Cir. 2009). "In determining whether agency action was arbitrary or capricious, the court must consider whether the agency considered the relevant factors and whether a clear error of judgment was made". *Id.* at 192. This judicial review "is highly deferential, with a presumption in favor of finding the agency action valid". *Id.* (citation omitted).

2. There are no federal funds paying for any of the MRE project.

3. NEPA is a procedural statute. *Id.* at 191. It does not mandate or dictate substantive results. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). Under NEPA, the court is limited to reviewing the Corps of Engineers's decision making process. Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227-28 (1980) (The court "cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken'".) (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)). "[E]ven agency action with adverse environmental effects can be NEPA- compliant so long as the agency has considered those effects and determined that competing policy values outweigh those costs". Ohio Valley

[1] The authorization by the Corps of Engineers was issued pursuant to a State Program General Permit (SPGP). This unknown tributary impacts 0.05 acre of non-tidal waters of the United States which is far less than the 1/3 acre of impact permitted under the SPGP. The MRE project involves no wet lands.

Environmental Coalition, at 191.

4. The plaintiffs have moved this court for TRO and preliminary injunctive relief "(1) vacating the authorization issued by the United States Army Corps of Engineers on May 25, 2011 to VDOT under §404(e) of the Clean Water Act, 33 U.S.C. §1344(e) and (2) prohibiting defendant VDOT from constructing the McIntire Road Extended pursuant to that authorization". *See* "Plaintiffs' Application for a Temporary Restraining order and / or a Preliminary Injunction" p.1. The factors for the court to consider prior to issuing either a preliminary injunction or TRO are the same. *See* Flicker v. Touhy, 305 F. Supp. 2nd 569, 571 (D. Md. 2004).

5. The MRE project is not a "road to nowhere" as alleged by the plaintiffs in their memorandum of law in support of their application. *See* "Plaintiffs' Memorandum in Support of Their Application for a Temporary Restraining Order and /or a Preliminary Injunction" (here-in-after the "Plaintiffs' Memorandum) P. 9. Even if the Route 250 above grade interchange is not built, MRE will be built and tie into Route 250 probably with an at grade intersection following submission of revised plans by the VDOT to the Corps of Engineers and the Corps' amending the present permit. The Route 250 interchange project and MRE are separate and distinct projects, they are separately funded, and they involve separate entities. However, the Corps added the impact of the waters of the United States cumulatively for both MRE and the interchange project and the total was below the amount permissible for an SPGP permit. The present plans prudently call for the MRE to stop short of Route 250 until it is determined if the Route 250 interchange will be built since there is pending litigation on that issue in this court. *See* Coalition to Preserve McIntrie Park v. Mendez, civil docket number 3:11-cv-00015.

6. The plaintiffs' allegation on page 7 of the Plaintiffs' Memorandum that the "the Corps

created a 'Memorandum of Agreement' for each of the two projects" and "also produced an EA for the interchange" are wrong. The Corps of Engineers produced a Memorandum of Agreement only for the MRE project and had nothing to do with the Federal Highway Administration's Environmental Assessment (EA) done for the Route 250 Interchange project.

7. On page 15 of the Plaintiffs' Memorandum, they reference the Council on Environmental Quality's (COQ's) guidance involving historic properties and Environmental Impact Statements (EISs). The COQ provides guidance, it does not issue mandates. The COQ lays out ten steps that have to be "considered in evaluating intensity", but the COQ does not hold that any one of the ten constitutes a causal factor requiring an EIS.

8. On page 26 of the Plaintiffs' Memorandum, they allege that "construction and operation of the MRE will have highly deleterious effects on the great number of historic properties situated in the immediate vicinity of the MRE ...". In fact, only a portion of the golf course in McIntire Park is adversely effected.

9. On page 16 of the Plaintiffs' Memorandum, they state that there will be "[p]ermanent- and in many cases unmitigated- damage to federally protected historic properties properties...". In fact the effects of the MRE are mitigated by the commitments contained in the Memorandum of Agreement that were agreeable to all signatories.

10. On page 31 of the Plaintiffs' Memorandum, addressing the issue of bond, they allege that "[p]laintiff Coalition to Preserve McIntire Park ... has almost no assets". This statement appears to contradict other statements by the plaintiffs in their memorandum that the MRE has long standing, wide spread and intense opposition. *See* Plaintiffs' Memorandum pp. 4,16, and17.

11. MRE has only 263 linear feet of stream impact and no impact on any of the

following: wetlands; threatened or endangered species; trout, shell fish, or anadromous fish; public water supply; scenic rivers; riffle pool complex or other special aquatic site; air quality nonattainment area, or flood plain elevations greater than or equal to one foot. Cultural resources effects are satisfied and resolved through the section 106 consultation process and resulting memorandum of agreement.

12. The plaintiffs correctly state the four elements applicable to preliminary injunctive relief as stated in The Real Truth About Obama v. Federal Election Commission, 575 F.3d 342, 346-47 (4th Cir. 2009)[2]. Those elements are "(1) [plaintiffs are] likely to succeed on the merits; (2) [plaintiffs are] likely to suffer irreparable harm absent preliminary relief; (3) the balance of equities [tip] in [plaintiffs'] favor; and (4) an injunction is in the public interest." Montgomery v. Housing Authority of Baltimore City, 731 F. Supp. 2d 439, 441 (D. Md. 3010) (citing Real Truth at 346).[3] The plaintiffs bear the burden to satisfy each of the four elements. *Id.* at 441-42. As to success on the merits, the plaintiffs "must show more than a 'grave or serious question for litigation', [they] bear "the 'heavy burden' of making a '*clear showing* that [they] are *likely* to succeed at trial on the merits'". Chattery International, Inc. v. Jolida, Inc., 2011 WL 1230822 *9 (D. Md. Mar. 28, 2011) (quoting Real Truth at 347) (emphasis in original). The plaintiffs must "make a clear showing" of likely success on the merits and irreparable harm and "only then may the court consider whether the balance of equities tips in the [plaintiffs'] favor". Cross v.

---

[2] Real Truth overruled Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977) and was vacated on other grounds at ____U.S. _____, 130 S.Ct. 2371 (2010). The Fourth Circuit then reissued, *inter alia*, that portion of their 2009 opinion stating the standards for preliminary injunctive relief. *See* 607 F.3d 355 (4th Cir. 2010).

[3] The plaintiffs must prove these same four elements for either TRO or preliminary injunctive relief. *See* Flicker v. Touhy, 305 F. Supp. 2nd 569, 571 (D. Md. 2004).

Deutche Bank Trust Company Americas, 2011 WL 1624958 *3 (D.S.C. Apr. 28, 2011) (*citing* Winter v. Nat. Resources Def. Council, Inc., 555 U.S. 7, ____, 129 S.Ct. 365, 376 (2008); Real Truth 575 F.3d at 345-47). "Finally, the court must pay particular regard to the public consequences of employing the extra ordinary relief of injunction." *Id.* (*citing* Real Truth, 575 F.3d at 347).

13. Preliminary injunctive relief is an "'extra ordinary remedy ... which is to be applied "only in [the] limited circumstances" which clearly demand it'". Howard v. Phillips, 2011 WL 947123 (W.D. Va. Mar. 15, 2011) (quotation citation omitted).

14. The plaintiffs cannot satisfy the Fourth Circuit standard for the "extra ordinary remedy" of preliminary injunctive relief. First, the plaintiffs cannot make a clear showing that they are likely to succeed on the merits. A review of the administrative record by this court will show that the Corps of Engineers did not issue or cause to be issued any permit using an arbitrary or capricious standard. Nor can the plaintiffs establish that the equities tip in their favor, or that injunctive relief is in the public interest.

THEREFORE, the plaintiff's motion for the "extra ordinary remedy" of injunctive relief must be denied.

Dated: July 18, 2011.

Respectfully submitted,

TIMOTHY J. HEAPHY
UNITED STATES ATTORNEY

/s/ Thomas L. Eckert
Thomas L. Eckert
Assistant U.S. Attorney
P.O. Box 1709
Roanoke, VA 24008
(540) 857-2761
(540) 857- 2283
Virginia Bar # 18781
E-mail: thomas.eckert@udsoj.gov
Attorney for the Corps of Engineers

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2011 that I filed this response of the Corps of Engineers with the court using the CM/ECF system which will electronically notify all counsel of record of the filing and send them a true copy of the same.

/s/ Thomas L. Eckert