NATURAL RESOURCES JOURNAL

Volume 19
Issue 3 *Summer 1979*

Summer 1979

Corps' Texas Cooper Lake and Channels Project Halted

Stephen K. Bowman

CORPS' TEXAS COOPER LAKE AND CHANNELS PROJECT HALTED

ENVIRONMENTAL LAW: The United States Army Corps of Engineers' final environmental impact statement on proposed multipurpose water project in Texas which ignores comments made on draft statement, fails to comply with mitigation requirements of the Fish and Wildlife Coordination Act, discusses an inadequate range of project alternatives and misstates the costs and benefits of the project held to violate the National Environmental Policy Act. *Texas Committee on Natural Resources v. Alexander,* 12 E.R.C. 1676 (D.E.D. Tex. 1978).

The South Sulphur River, with its headwaters in northeastern Texas, flows eastward along its course of forty-five miles, draining some five hundred square miles of primarily agricultural and ranch land in Hunt, Hopkins, and Delta counties. At the east end of Delta county, the South Culphur meets the North Sulphur to form Sulphur River, which continues eastward into Arkansas. Near the Arkansas/Texas border, Sulphur River is dammed to form Wright Patman Lake.

By amendment to the Flood Control Act of 1954, Congress in 1955 authorized the Cooper Lake and Channels Project (Project) which proposed a flood control, water supply and increased land utilization system for the South Sulphur drainage area by means of river channelization and an earthfill dam.[1] Between 1955 and 1967, the Project underwent several pre-construction expansions and modifications.[2] In 1971, the United States Army Corps of Engineers (Corps) began construction on the Project.

In May of 1971, plaintiffs, the Texas Committee on Natural Resources, sought an injunction in the United States District Court for

1. Flood Control Act of 1954, as amended by Pub. L. No. 84-218, approved September 3, 1955.

2. H.R. Doc. No. 1056, 84th Cong. and S. Doc. No. 1027, 84th Cong. added 10,000 acre-feet of water supply to the lake. In 1959, water supply was expanded to 75,400 acre-feet pursuant to 43 U.S.C. §390(b) (1958). Further expansions under this statute were made in 1965. In 1958, the damsite was changed and the conservation storage capacity of the lake was increased by 9200 acre-feet in compliance with the project document. In 1967, recreation was added as a project purpose pursuant to Pub. L. No. 87-874 and water quality control was added as a project purpose pursuant to Pub. L. No. 87-88 §2. In December 1967, water quality control was deleted as a project purpose.

the Eastern District of Texas to stop construction on the Project. Plaintiffs alleged that the Corps had not prepared and submitted an environmental impact statement (EIS) as required by the National Environmental Policy Act of 1969 (NEPA).[3] At a hearing, the court agreed with plaintiffs and preliminarily enjoined the Corps from proceeding with construction until it completed an EIS on the Project. In 1976, the Corps submitted a draft EIS upon which a public hearing was held.[4] Pursuant to NEPA regulation,[5] the Corps filed its final EIS with the President's Council on Environmental Quality in June of 1977.

In *Texas Committee on Natural Resources v. Alexander*, plaintiffs sought to permanently enjoin construction of the Project by challenging the sufficiency of this final EIS on six grounds: 1) the absence of state agency comments and its failure to address those comments that were made; 2) its failure to set out adequate and concurrent mitigation measures for losses to fish and wildlife; 3) its failure to discuss the alternative of a water supply project independent of flood control provisions; 4) its inadequate explanation of non-structural flood control management; 5) its bias in the presented cost-benefit ratios and its failure to analyze the ratios presented; and 6) its lack of discussion on the impact of converting Wright Patman Lake water to the Project.

In examining the first allegation, the court found that the Corps had received some state agency comments from a designated Texas clearinghouse, but had not solicited all concerned agencies directly for comment. The court noted that the Corps' own regulations[6] provide for two sources of state comment: the state agencies *and* designated state clearinghouses. The court held that the use of the conjunctive word "and" in the regulation indicated that the Corps should have exhausted both sources. The Corps' failure to do so was not in compliance with its own regulations or the intent of NEPA.[7]

In construing the Fish and Wildlife Coordination Act[8] with respect to the second allegation, the court relied on *Akers v. Resor*[9] in holding that project and mitigation efforts must proceed concur-

3. 42 U.S.C. §§4331-4361 (1976).
4. The hearing was held July 31, 1976 in Commerce, Texas.
5. 42 U.S.C. §§4332(2)(c) (1976).
6. 33 C.F.R. §209.410(k)(4) (1978).
7. 42 U.S.C. §4332(2)(c) (1976) states that the Federal official "shall consult with and obtain ... the comments and views of the appropriate Federal, State and local agencies which are authorized to develop and enforce environmental standards . . ."
8. 16 U.S.C. §§661, 662(b) (1976).
9. 339 F. Supp. 1375 (W.D. Tenn. 1975).

rently from funding through completion.[10] The court further stated that coordination between the agency of construction and the Fish and Wildlife Service should be continuous and should keep abreast of evolving methodology. Thus, the court found the Corps' claim that the Fish and Wildlife Service is bound by its initial mitigation reports of 1966 to be without merit. Failure to practice continuous coordination with the Fish and Wildlife Service was held to be in violation of the Fish and Wildlife Coordination Act.

In the area of alternatives to the Project, plaintiffs claimed that the Corps had only considered project alternatives separately and without reference to each other. Plaintiffs claimed that the Corps failed to integrate the alternatives, taking the most suitable points of each to create a set of more feasible alternatives. In particular, plaintiffs pointed to the lack of discussion on non-structural alternatives such as zoning, flood insurance, warning systems and public education. Agreeing with plaintiffs' claim, the court noted that the Corps had managed to integrate its alternative structural plans into various combinations, but had failed to do the same with the non-structural alternatives. The court also found that several statements in the EIS concerning non-structural tools were misleading,[11] and another statement concerning flood plain zoning to be contrary to Texas law.[12] For these reasons, the court held the Corps' discussion of alternatives to the Project to be insufficient.

In considering the cost-benefit ratios contained in the EIS, the court noted that the Corps' regulations require both cost-benefit ratios and analyses.[13] In examining the EIS, the court found that the analysis of the presented cost-benefit ratios was either inadequate or entirely absent. Since the Corps had failed to present integrated non-structural alternatives, those ratios and analyses were obviously absent. Regarding those ratios presented, plaintiffs claimed that the Corps had double-counted the recreation benefits of the Project.

10. The court in *Akers* stated that "a construction agency such as the Corps must consult in good faith with the ecology agencies and . . . it would obviously be almost fruitless not to provide funding for the project and for whatever mitigation is to be funded at the same time so that work could proceed concurrently." 339 F. Supp. at 1380.

11. The court said "[T]he description of flood plain acquisition implies that it is inferior to a structural flood control program because the former does not prevent flooding . . . however, prevention of flooding is not the goal of this non-structural tool; rather, the goal is to accommodate floods." 12 E.R.C. at 1684.

12. The court said "[T]he EIS incorrectly states that Texas counties lack authority to zone unincorporated land, and that zoning regulation would disrupt the existing agricultural and economic base of the area. But the undisputed evidence shows that agricultural use is an established exception from flood plain zoning." 12 E.R.C. at 1684.

13. 33 C.F.R. §209.410(i)(7) (1978).

Plaintiffs claimed that water-oriented recreation would simply shift to Cooper Lake from other reservoirs upon completion of the project. Since construction of these other reservoirs had been justified in part by recreational benefits, claiming these benefits again for Cooper Lake amounted to a double counting of a surplus commodity. For these reasons, the court found the cost-benefit discussion contained in the EIS to be deficient and in violation of applicable regulations.

In considering the final allegation, the court examined the imminence of the conversion of Wright Patman Lake water to the Cooper Lake Project. It found that while reallocation of 120,000 acre-feet of water from Wright Patman Lake to the Project had been authorized by Congress, actual transfer of the water was not mandated by that authorization or by contracts negotiated between Cooper Lake and Wright Patman Lake. Citing *Kleppe v. Sierra Club*,[14] the court held that intent or contemplation of the water transfer was not sufficient to require an impact statement.[15] However, the court noted that when the conversion becomes imminent and an EIS is prepared, the statement must contain a discussion of the cumulative impacts of the Cooper Lake and Channels Project.[16]

In its summary, the court reviewed other Fifth Circuit opinions dealing with the adequacy of environmental impact statements and stated that its role was "to determine whether the EIS was compiled with objective good faith and whether the resulting statement would permit a decisionmaker to fully consider and balance the environmental factors."[17] In light of the numerous deficiencies it found in the Corps' EIS, the court ruled that the impact statement did not meet this standard. Consequently, the Corps was permanently enjoined from continuing the Cooper Lake and Channels Project until it corrects the deficiencies of the EIS.

Texas Committee on Natural Resources v. Alexander is a well-reasoned opinion which clearly sets forth Fifth Circuit judicial standards of compliance with respect to NEPA. It appears from the facts of the case that the Corps, in wake of the preliminary injunction which issued against it, was only paying lip service to NEPA in preparing the EIS. The holding of this case makes it clear that lip

14. 427 U.S. 390 (1976).

15. The court in *Kleppe* said "[T]he mere contemplation of a certain action is not sufficient to require an impact statement." 427 U.S. at 404.

16. 12 E.R.C. at 1688.

17. Sierra Club v. Morton, 510 F.2d 813 (5th Cir. 1975) at 819, as quoted in Texas Committee on Natural Resources v. Alexander, 12 E.R.C. at 1688-1689.

service will not do in the Fifth Circuit, and that the test of objective good faith will be carefully applied to the facts in determining the adequacy of an environmental impact statement.

STEPHEN K. BOWMAN