FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
SEP 30 2004
JAMES W. McCORMACK, CLERK
By: DEP CLERK

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

SAVE GREERS FERRY LAKE, INC., an Arkansas Not-for-Profit Corporation, and ARKANSAS NATURE ALLIANCE, an Arkansas Not-for-Profit Corporation

PLAINTIFFS

VS.

Case No. 1:02CV00064 WRW

UNITED STATES ARMY CORPS OF ENGINEERS; COLONEL BENJAMIN BUTLER, District Engineer, Little Rock Corps of Engineers; and BRIG. GEN. ROBERT CREER, Division Commander, Southwest Division, U.S. Army Corps of Engineers

DEFENDANTS

ORDER

Pending are Plaintiffs' Motion for Summary Judgment (Doc. No. 18) and Defendants' Cross Motion for Summary Judgment (Doc. No 28). All responses and replies have been filed, and the parties have submitted the requested supplemental briefs. For the following reasons, both motions are GRANTED in PART and DENIED in PART.[1]

I. STATEMENT OF FACTS

This is the second challenge brought by Plaintiffs Save Greers Ferry Lake, Inc. and Arkansas Nature Alliance ("SGFL" and "ANA" or "Plaintiffs") to a Shoreline Management Plan ("SMP") prepared by the Defendant United States Army Corps of Engineers ("COE") for Greers Ferry Lake ("the Lake"). The Lake, which was completed in 1964, is located in north-central Arkansas. The Lake provides drinking water to approximately 31,000 customers in Cleburne, Van Buren, Faulkner,

[1] Warning to the general reader: This Order contains a substantial amount of legalese, bureaucratic-ese, and federal regulatory-ese. If the parties' motions were not already overripe, I might be able to write a better translation with time. This dilemma puts me in mind of the late Richard S. Arnold, who could turn all sorts of "-eses" into plain, pleasing-to-the-eye prose, apparently with ease.

and White counties, and also serves as a popular recreational area. Private boat docks have been permitted on the Lake since 1961.[2]

The facts underlying this case began on January 26, 1999, when the COE announced that it would receive reallocation requests for the Lake until April 1, 1999.[3] Four natural resource professionals reviewed 129 rezoning requests and the COE decided that there was enough public interest to justify the possible modification of the 1994 SMP. On June 15, 1999, participants at a public workshop were allowed to review the rezoning request evaluation, and to submit comments about the existing plan and to propose changes.[4] Approximately 168 comments were received,[5] and a draft SMP and Environmental Assessment ("EA") were completed in December 1999.[6]

On January 11, 2000, another public workshop was held.[7] After receiving public comments, Defendants prepared a FINAL EA and Finding of No Significant Impact ("FONSI").[8] The 2000 SMP was approved by the Southwestern Division Commander on March 14, 2000.[9] Between March 15 and May 30, 2000, 93 requests for rezoning were approved and 32 permits for private docks were issued. Five permit owners immediately placed docks on the Lake.

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[2] Administrative Record Excepts ("ARE") at 2804. The Division Engineer approved the initial Lakeshore Management Plan (now known as the SMP) on October 7, 1974. The plan was reviewed and updated in 1976, 1982, and 1994.

[3] *Id.* at 2416.

[4] *Id.* at 2501.

[5] *Id.* at 2982-3226.

[6] *Id.* at 2533-2624.

[7] ARE at 2647.

[8] *Id.* at 2794.

[9] *Id.* at 2909-47.

On April 12, 2000, SGFL filed a lawsuit challenging the validity of the 2000 SMP and seeking an injunction from the United States District Court.[10] The Court declared the 2000 SMP invalid because the COE's FONSI was not supported by the EA. The Court also held that the COE's proposed actions could adversely, and significantly, impact the Lake, and found that an Environmental Impact Statement ("EIS") should have been completed. On June 15, 2000, the COE withdrew the 2000 SMP and announced that the 1994 SMP would remain in effect until an EIS and new SMP were completed.

On December 5, 2000, the COE held a public meeting in Heber Springs, requested public input for the EIS's preparation,[11] and later issued a Final Scoping Report in April 2001. The Draft EIS was issued in November 2001,[12] and a public meeting was held December 4, 2001. The COE received approximately 6,000 comments concerning the Preferred Alternative set forth in the Draft EIS--more than 4,000 comments opposed, and only 1,100 favored, the Preferred Alternative. Plaintiff SGFL submitted extensive comments opposing the Draft EIS.

In the Final EIS, the six alternatives considered by the COE during the administrative process were discussed extensively. Under Alternative 1 (the "No Action" Alternative), the COE would have made no changes to the 1994 SMP. No new management elements would have been adopted,

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[10] ARE, Preamble to Final EIS entitled NEPA Process at 1.

[11] The purpose of the scoping process is to: (1) identify the affected public agency concerns; (2) define the issues and alternatives that will be examined in detail in the EIS while simultaneously devoting less attention and time to issues that cause no concern; and (3) save time in the overall process by helping to ensure that draft statements adequately address relevant issues, reducing the possibility that new comments will cause a statement to be rewritten or supplemented. Final EIS Scoping Report, pp. 1-2 and 1-3.

[12] Plaintiffs emphasize that the COE relied on elements contained in the invalidated 2000 SMP when it prepared the Final EIS and 2002 SMP. I note that, although I held that Defendants should have prepared an EIS for the 2000 SMP in order to comply with NEPA, I did not otherwise express any opinion regarding the COE's proposed actions in the 2000 SMP. *See Save Greers Ferry v. U.S. Army Corps of Engineers*, Case No. 1:00CV00051 WRW (E.D. Ark. filed July 27, 2000) (hereafter "*SGFL I*").

no existing elements would have been modified, and rezoning applications received would have been returned to applicants. Additionally, no changes to grandfathered docks would have been permitted, and mowing would have been allowed no more than 50 feet from habitable structures.[13]

Under Alternative 2 (the "Approval of Rezoning Requests Meeting the 80 Percent Criteria" Alternative), no future rezoning requests would have been permitted, except for the 93 rezoning requests which satisfied the 80 percent criteria during the 1999 review. Mowing would have been prohibited from the vegetated edge of the shoreline for 50 feet on COE property, and the mowing would have been allowed up to 100 feet from habitable structures, except where the mowing radius might conflict with the vegetative buffer strip. Under this alternative, the COE would defer the regulation of boats with sleeping quarters and/or marine sanitation devices to State and Federal regulations; however, those boats would have been required to be moored at commercial docks. Finally, the reconstruction of grandfathered docks to alternative dimensions, or the reallocation of docks to the limited development area, would have been permitted.[14]

Under Alternative 3 (the "No Growth" Alternative), no rezoning applications would have been accepted; no new shoreline use permits would have been allowed. Only expiring permits would have been renewed, but only with previously permitted specifications. Permits for vegetation modification would not have been permitted, and expiring permits would not have been renewed. The restriction for boats with sleeping quarters and/or marine sanitation devices would have remained the same.[15]

Alternative 4 (the "Approval of Rezoning Requests Meeting the 90 Percent Criteria" Alternative) would have been almost identical to Alternative 2. Only rezoning requests which

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[13] ARE at 16996-97.

[14] *Id.* at 16997.

[15] *Id.*

satisfied 90 percent of the rezoning criteria would have been approved. Also, under this alternative, a minimum 100-foot vegetative buffer strip would have been established, and no mowing would have been permitted within 100 feet of the vegetated edge of the shoreline.[16]

Under Alternative 5 (the "Maximum Modification" Alternative), the maximum rezoning would have been permitted. Limited Development Areas would have been increased form 7 percent to 33 percent, based on the Lake's topography; however, no rezoning requests would have been accepted or approved at future SMP reviews. Authorization for mowing would have been increased from 50 to 200 feet from habitable structures, and boats with sleeping quarters and/or marine sanitation devices would have been required to be docked at commercial docks. Relocation or reallocation of grandfathered docks would have been permitted, as set forth under Alternative 2.[17]

Alternative 6 (the "Revised Preferred Alternative"),[18] which was subsequently adopted, increases the score required for rezoning requests from 80 to 90 percent; provides that 56 pending rezoning requests will be approved (of which 15 requests approved under the 2000 SMP, but which did not meet the 90 percent scoring requirement, will be given conditional approval); redesignates three areas of the Lake as "Very High Scenic Integrity Protected Areas" ("VHSAs"), in which no rezoning requests may be approved except in areas adjacent to the VHSAs and "grandfathered" docks;[19] identifies the "Narrows" area as a "Heavy Use Area" in which no additional docks are permitted; establishes a 100-foot "vegetative buffer strip" and allows landowners to request permits to mow up to 100 feet from habitable structures, if it does not intrude into the 100-foot vegetative buffer strip; prohibits the acceptance, evaluation, or approval of additional boat dock rezoning

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[16] *Id.* at 16998.

[17] *Id.*

[18] ARE at 17059-65.

[19] Maps designating these VHSAs are included in Alternative 6 in the Final EIS. ARE at 17063.

requests during future SMP reviews;[20] and requires boats with sleeping quarters and/or marine sanitation devices to be moored at commercial docks.[21] The COE issued the Final EIS in April 2002,[22] and on June 11, 2002, SGFL again submitted detailed comments.[23]

On July 2, 2002, the COE issued a Record of Decision ("ROD"),[24] finding that the EIS satisfied the National Environmental Policy Act and Alternative 6 would result in no significant adverse cumulative impacts in the foreseeable future. That same day, the COE issued the 2002 SMP.[25] When Plaintiffs filed this lawsuit, the COE voluntarily agreed to stop issuing permits under the 2002 SMP, except for those five already issued under the 2000 SMP, which were constructed on the Lake before July 31, 2000, when this Court issued an injunction allowing those docks to remain on the lake.[26] Each party agrees that summary judgment is proper in this case.

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[20] Although not stated in Alternative 6, the COE has acknowledged that this prohibition against future rezoning requests may be revoked at subsequent SMP reviews. Although I am troubled by this admission, there is no authority which allows me to prevent the COE from changing its "mind" during future reviews.

[21] ARE at 16998.

[22] *Id.* at at 16988-17682.

[23] *Id.* at 19099-116.

[24] *Id.* at 19824-36.

[25] ARE at 19860-90.

[26] *SGFL I*, Doc. Nos. 37, 42 (July 31 and August 24, 2000). The injunction provided that the docks could remain on the Lake until the COE implemented a new shoreline management plan in full accordance with NEPA, or until Defendants appealed to the Eighth Circuit for an Order allowing the docks.