

Reference: RGL 86-08

Subject: NEPA LITIGATION-SIGNIFICANCE

Title: SUMMARY OF DECISION IN RIVER ROAD ALLIANCE VS CORPS OF ENGINEERS

Issued: 08/21/86 Expires: 12/31/88

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**Description: LITIGATION DEALING WITH SIGNIFICANCE OF ASTHETIC
IMPACTS, CONSIDERATION OF USFWS COMMENTS, TIME & EXPENSE
OF EIS, THE EXTENT OF AN ALTERNATIVE SEARCH, & CONSIDERATION
OF PUBLIC HEARINGS**

1. The Office of the Chief Counsel has recently distributed a legal analysis of a recent decision, River Road Alliance v. Corps of Engineers. The following is a summary of that opinion.
2. The Seventh Circuit Court of Appeals, in ruling on the subject case, found that sensible interpretation of the word "significant" can, in certain cases, allow consideration of whether the time and expense of preparing an environmental impact statement (EIS) is worthwhile. The subject case is centered on the aesthetic impact of a barge fleeting facility in a relatively natural area of the Mississippi River. The court found that the issue was not whether the impact will likely occur, but whether the Corps exceeded the bounds of its decision-making authority in concluding that the impact was not significant enough to require an EIS. In other words, the issue was whether the Corps abused its discretion in deciding not to prepare an EIS.
3. The court also indicated that, while an agency is not required to hold a public hearing before preparing an environmental assessment, when it does so the court is likely to give its decision greater weight. The court stated the Corps had the advantage of hearing live testimony from the neighbors and was in a better position to gauge the intensity and sincerity of public opinion than the court. The court would not, therefore, rule that the Corps was unreasonable to consider the aesthetic impact alone as insufficient to require an EIS. In fact, the court indicated that aesthetic objections alone would rarely compel preparation of an EIS because of the difficulty and subjectivity of analyzing such impacts.
4. The court also stated that although the U.S. Fish and Wildlife Service was opposed to the facility, the Corps was not obligated to agree, only to hear and consider the Service's objections.

5. The court also stated that a non-significant impact was not equal to no impact and, therefore, alternatives must be considered. However, it also pointed out that the smaller the impact, the less extensive the search for alternatives can an agency be expected to conduct. The applicant had conducted a study of alternatives and found none suitable. The Corps was not obligated to search further unless the plaintiffs could suggest plausible sites overlooked by the applicant. The court stated that the Corps was not in a position to conduct a feasibility study of alternative sites on the Mississippi for a barge fleeting facility. Such a study would require the Corps to evaluate the applicants' business needs and availability of riparian access.

6. This guidance expires 31 December 1988 unless sooner revised or rescinded.

FOR THE CHIEF OF ENGINEERS: