

Regulatory Guidance Letter 88-11

SUBJECT: NEPA Scope of Analysis; *Mall Properties, Inc. vs. Marsh*

DATE: August 22, 1988

EXPIRES: December 31, 1990

In the subject case, the court decided that the Corps had exceeded its authority by basing its denial on socio-economic harms that the court believed were not "proximately-related" to the purpose of the Clean Water Act (CWA), i.e., changes in the physical environment. Specifically, the court found the Corps decision to deny a permit for a shopping mall in North Haven, Connecticut, which was based on the adverse effect the mall's economic competition would have on downtown New Haven, was too "attenuated" from the purpose of our statutory regulatory authority.

Because of past court decisions, we consider our authority under Section 10 of the Rivers and Harbors Act of 1899 to allow consideration of a broad range of public interest factors, including socioeconomic factors and have similarly applied this concept to permit decisions under Section 404 of the CWA. The court appeared to base its decision largely on our authority under Section 404, and did not appear to fully consider our Section 10 authority. We still believe that we should consider a broad range of public interest factors when making permit decisions under both authorities, but must be mindful of the relationship of those factors to the activity being regulated.

In the subject case, the court distinguished between socioeconomic impacts "proximately-related" to the permit action and those impacts which, despite this being the only remaining appropriate site in the market area, would occur whether the mall was located on upland or wetland. In other words, the adverse impacts on which the Corps based its denial, were, in the court's opinion, too "attenuated" from the purpose of the permit action under the Clean Water Act (i.e., to restore and maintain the chemical, physical and biological integrity of the aquatic environment) to have been weighed so heavily by the DE.

We do not think that this decision totally restrains our consideration of socioeconomic impacts. As mentioned above, the court did not seem to consider that our permit action also involved Section 10 authority. However, DEs should give less weight to impacts that are, at best, weakly related to the purpose of our permit action and statutory authority, and not let such impacts be the sole or most important basis for a permit denial.

The decision lends some guidance for the public interest review. That is, while all direct, indirect and cumulative impacts flowing from our permit action should be considered, it is important to give such impacts appropriate weight in your permit decision. More strongly related indirect impacts should be given heavy consideration, while more

"attenuated" impacts should be considered, but less heavily. For example, the impacts of water withdrawals for hydroelectric power generation on downstream aquatic communities would be indirect effects of a permit for discharges associated with construction of such a facility. Spin-off development, such as small restaurants, stores and gas stations constructed to capture business from plant employees would similarly be an indirect effect. However, the latter would be likely to result from any business development in the vicinity, whether or not a DA permit were required, and should thus be weighed less heavily than the former in permit decisions.

This guidance expires 31 December 1990 unless sooner revised or rescinded.