

United States v. Fox River Marine Services, Inc.

MEMORANDUM OPINION AND ORDER

WILLIAMS, J.

The United States filed a two count amended complaint against defendants, Fox River Marine Services, Inc. ("Ericson Marine") and Donald Ericson, Jr. ("Ericson"), claiming that defendants violated the federal Rivers and Harbors Act, 33 U.S.C. § 403 et seq. ("RHA"). Specifically, the United States alleges that defendants violated the RHA by maintaining approximately 50 unauthorized piers on the Fox River in northern Illinois. The United States moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Defendants also move the court for summary judgment in their favor. For the following reasons, the court denies both parties' motions for summary judgment.

BACKGROUND

The Fox River originates in southeastern Wisconsin, just west of Milwaukee, and flows southward before entering Illinois in the northwest corner of Lake County. The Fox River then flows in a southerly direction until it joins the Illinois River at Ottawa, Illinois. Defendant Ericson Marine operates a boat marina on the Fox River just north of where the Illinois and Fox rivers intersect. Ericson Marina is comprised of two parcels of property, one located on the east side of the Fox River and one located on the west side. Defendant Donald Ericson ("Ericson") is the current owner of the Ericson Marina. Ericson Marine's history is an important aspect of this case since it not only "fills out" the relationships that exist between the parties and the witnesses, but also because it establishes which witnesses are competent to testify on issues that are critical to the motions before the court.

In 1946, William Treadwell bought the property that is now the west side of Ericson Marine and operated a boat marina there. (Treadwell dep. at 12-14). While William Treadwell never owned the property on the east side of the marina, he did rent that property from an individual so that he could expand his business by increasing the number of piers available at his marina. (Treadwell dep. at 35). During William Treadwell's use of the east and west sides of the marina, all the piers in the marina were permanent and none of them were floating. (Treadwell dep. at 34-35).

Stephen Treadwell ("Treadwell"), William Treadwell's grandson, lived on the west side of the marina until 1979. Stephen Treadwell worked at his grandfather's marina "off and on" until the marina was sold in 1984 to an individual named Fortin. (Treadwell dep. at 34-35). Even after Fortin bought the marina, Stephen Treadwell's father continued to work at the marina. Therefore, Stephen Treadwell's familiarity with the number of piers at the marina extends to 1985 or 1986. (Treadwell dep. at 34-35).

Based on a photograph of the marina taken during the mid-1970's, Stephen Treadwell concluded that the marina had approximately 30 piers on the west bank of the Fox River when his grandfather sold the marina in 1984. (Treadwell dep. at 9, 24-27). Treadwell also estimated that there were 10 piers on the land that is now the east side of Ericson's marina in 1985. (Treadwell dep. at 16-17). Treadwell also stated that Fortin added "a few" piers to the west bank of the marina, but he believed that the number was limited due to the small space available for additional piers. (Treadwell dep. at 29-30).

In October 1985, Ericson purchased the west side of the marina from Fortin, and Ericson remains the owner of that property. (Ericson dep. at 32-33, 302-03). Ericson then purchased the east side of the marina in 1990. (Ericson dep.

at 51). Ericson claims that there were "approximately 60" piers located on the west side of the marina when he bought it in 1985. (Ericson dep. at 38.) After he bought the marina, Ericson removed the wooden piers on the west side in 1986 or 1987, and replaced them with aluminum floating piers. (Ericson dep. at 45, 49-51, 69-70). Ericson claims that he only added "six or seven" piers during the time that he was replacing the permanent piers. (Ericson dep. at 49- 51, 69-70). In addition, Ericson claims that there were 11 piers and 11 pier extensions (temporary piers placed at the end of the permanent pier to allow additional boats to be tied to the existing pier) on the east side of the marina when he bought it in 1990. (Ericson dep. at 51, 187).

After buying the property on the east side of the marina, Ericson removed the pier extensions, but kept nine of the piers that were on the east side of the marina. (Ericson dep. at 52). He also added "about 15" piers to the east side of the marina in 1992. (Ericson dep. at 188-90). To support his position about the number of piers that existed on the west side marina in 1985, Ericson provided this court with affidavits from three witnesses. Robert Bibbiano estimates that there were approximately 70 piers on the west bank in 1985 (Bibbiano Aff. 5-6; Ericson 12(n)(3)(B) 9). Al Delfino estimates that there were 60 piers at the west bank facility in 1985. (Delfino Aff. 4-5, Ericson 12(n)(3)(B) 12). Robert Wiberg also estimated that 60 piers existed on the west side of the marina in 1985. (Wiberg Aff. 7; Ericson 12(n)(3)(B) 5). All of these witnesses further stated that Fortin replaced and added new piers from 1984 to 1985. (Ericson 12(n)(3)(B) 4, 8, 11, 12).

Under the RHA, a person wishing to construct a pier in any navigable waterway must first obtain a permit from the Army Corps of Engineers ("the Corps"). Based on this requirement, Ericson applied for an after-the-fact permit in August 1991 for the piers on the east side of the marina. (Ericson dep. at 326). However, Ericson never applied for an after-the-fact permit for the piers on the west side of Fox River. (Wozniak dep. at 49, 139-42). In September 1991, the Corps undertook an Environmental Impact Study ("EIS") to determine what the Corps could do to address the deteriorating quality of the aquatic environment in the Fox River due to heavy boat traffic. (Isoe dep. at 24-25). In March 1992, the Corps informed Ericson that his after-the-fact permit for the piers on the east side of the Fox River had been suspended pending completion of the EIS. (Wozniak dep. at 139-42).

On June 21, 1994, the Corps issued the Fox River EIS Record of Decision ("ROD"). (Wozniak dep. at 81). The EIS ROD stated that increases in boating activities on the Fox River were having a destructive effect on the ecological and property values of the river. (Wozniak dep. Ex. 4). To reduce this destructive effect, the ROD concluded that a change in the Corps' policy of allowing pier permits could slow the river's environmental degradation because the number of boats on the river is affected by access to the river, and the Corps possessed the power to control access to the river through its permitting policy. (Id.)

Consequently, the EIS ROD established a "no net gain" policy of allowing permits. (Wozniak dep. at 81). Under the Corps new "no net gain" policy, to obtain a permit for piers from the Corps, a marina must remove currently authorized and serviceable multi-user piers that provide dockage for the same size and equivalent number of boats. (Wozniak dep. Ex. 4 at 2). To qualify for removal credit, existing piers had to either be (1) authorized under existing Corps permits; or (2) be in existence in 1985, as shown in aerial photographs, and in continued use in 1992, as shown in aerial photographs. (Id.)

The Corps also adopted a "grandfathering" policy that allowed certain piers on the Fox River to remain in place without a permit from the Corps. Under this policy, if a pier on the Fox River was in existence and in continuous use since 1985 (as verified by aerial photographs), the owner of that pier would not need a permit from the Corps for that structure. (Wozniak dep. at 58-60). Thus, piers not shown in 1985 aerial photographs were required to have a permit. (Wozniak aff. 9). The Corps primarily adopted the 1985 "grandfather" date to be consistent with a State of

Illinois policy which allowed piers that were present on the Fox River as of 1985 to remain without a permit. (Wozniak dep. at 58-59, 73-74, 77-78; Isoe dep. at 32-35).

Another reason the Corps adopted the 1985 "grandfathering" policy was because of the Corps' belief that high quality aerial photographs existed for the entire Fox River. (Wozniak dep. At 11, 63-65). The Corps based this belief on Keith Wozniak's ("Wozniak"), Chief of the Enforcement/Compliance Section of the Corps' Chicago District, representation to Corps officials that such high quality photographs were taken in July 1985. (Wozniak dep. at 11, 63-65). Wozniak based this representation on the fact that other photographs of the Fox River region had been taken during that period. (Wozniak dep. at 63-65). These other photographs were taken by the Aerometrics Company, pursuant to a contract with the Corps. (Wozniak dep. at 63-65). However, Wozniak later learned that the portion of the Fox River on which Ericson Marine is located was not part of Aerometrics' contract, and, thus, was not photographed. (Wozniak dep. at 63- 70). Although a photograph from the Aerometrics Company did not exist for Ericson Marina, the Corps obtained aerial photographs of Ericson Marine that were taken in April 1985 and July 1985. However, defendants contend that both photographs are unreliable. Specifically, the April 1985 photograph was taken well before the boating season, and, as the United States admits, the quality of the July 1985 photograph is poor.

In an August 1995 letter, the Corps advised Ericson Marine that it was violating the RHA and the Corps' permit policy. (Wozniak dep. at 163-64). In that letter, the Corps ordered Ericson Marine to either remove all unpermitted piers in excess of those that were shown on 1985 aerial photographs or to apply for an after-the-fact permit in the manner required by the EIS ROD. (Wozniak dep. at 163). The Corps informed Ericson that a July 1985 photograph showed only 36 piers on the west side of the marina and 11 piers on the east side of the marina, for a total of 47 piers in Ericson Marina. (Wozniak dep. At 163- 64). While the July 1985 photograph was the best picture depicting the number of piers in the 1985 boating season, the quality of the picture was poor and, as a result, the Corps resolved all doubts about the existence of the pier in the defendants' favor. (Wozniak dep. at 88). In further support of its position regarding the number of piers in existence in 1985, the United States points to the testimony of Stephen Treadwell.

Neither Ericson nor Ericson Marine removed any of the piers that exceeded the 47 piers referenced in the August 1995 letter. In addition, defendants did not apply for new after-the-fact permits that complied with the new EIS ROD requirements. (Wozniak aff. 12). As a result, in Counts I and II of its second amended complaint, the United States charged defendants Ericson and Ericson Marine with continuing to maintain approximately 50 unauthorized piers on the Fox River, and, thus, seeks to remove each of these piers pursuant to Section 10 of the Rivers and Harbors Act. (Second Amend. Comp. 17-19).

In their cross-motion for summary judgment, defendants contend that the court should find that the Corps' decision to select 1985 as the measuring year for the "no net gain" and "grandfather" policies is arbitrary and capricious under section 706(a)(2) of the Administrative and Procedure Act ("APA"), 5 U.S.C. § 706(a)(2). Defendants also contend that the Corps' decision regarding the number of piers that existed in 1985 was also arbitrary and capricious because the Corps repeatedly failed to abide by its own regulations, and used evidence of poor quality in making its determination. Finally, defendants argue that this court should stay this litigation until the Corps processes defendants' after-the-fact application that was suspended when the Corps undertook the EIS.

ANALYSIS

Both parties move for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. Rule 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to

any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed.R.Civ.P. 56(c). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,248 (1986). A plaintiff cannot rest on mere allegations of a claim without any significant probative evidence that supports his complaint. See *Anderson*, 477 U.S. at 248; see *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968).

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Accordingly, the non-moving party must designate specific facts showing a genuine issue for trial. *Id.* at 324. Nevertheless, in determining the existence of any genuine issues of material fact, the court draws all reasonable inferences in the light most favorable to the non-movant. *Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 236 (7th Cir.1991).

I. United States' Motion for Summary Judgment

Section 10 of the Rivers and Harbors Act provides that "a permit from the Army Corps of Engineers is required for the installation of any structure in the navigable waters [of the United States] which may interfere with navigation, including piers, docks, and ramps." *PUD Number 1 v. Washington Dep't. of Ecology*, 511 U.S. 700, 722 (1994); 33 U.S.C. § 403. Section 10 of the RHA is very broad in its scope and, by its very terms, "flatly prohibits" the construction of any structure in any water of the United States except with the authorization of the Corps. *United States v. Alaska*, 503 U.S. 569, 576 (1992). In fact, the Supreme Court has gone as far as stating that "the provision appears to give the Secretary [of the Army] unlimited discretion to grant or deny a permit for construction of a structure." *Id.*

When the RHA was initially passed, the Secretary of the Army's authority was confined to considerations of navigation. *Id.* at 578. However, this authority expanded due to the Supreme Court's holding in *United States v. Alaska*, and also because of Congress' interpretation of Section 10 of the RHA. See *id.* Regulations then expanded the Secretary of the Army's authority so that the general policy guidance for permit issuance included considerations of "the effects of permitted activities on the public interest including effects upon water quality, recreation, fish and wildlife, pollution, our natural resources, as well as the effects on navigation." 33 C.F.R. §209.330(a).

Even after the Corps adopted this more expansive reading, the House Committee on Government Operations concluded that the Corps was still not interpreting its statutory authority broadly enough. H.R. Rep. No. 91-917, p. 6 (1970). The House Committee emphasized that when making regulation decisions, including permitting policies, the Corps should consider "all aspects of the public interest, including not only navigation but also conservation of natural resources, fish and wildlife, air and water quality, aesthetics, scenic view, historic sites, ecology, and other public interest aspects of the waterway." *Id.* Based on this statement, the Corps issued regulations interpreting its statutory authority to empower it to take into account a full range of economic, social, and environmental factors when making permit policy decisions. See 33 C.F.R. § 209.120(f)(1).

As noted, the Corps created a new "no net gain" policy for allowing pier permits. The United States contends that since none of the defendants' piers are authorized by Corps' permits, the only issue for this court to determine is the number piers that may remain under the "grandfather" policy of the EIS ROD. To determine the number of "grandfathered" piers, the Corps used the July 1985 photograph. Because the quality of the July 1985 photograph was poor, the Corps resolved all doubts about the existence of a pier in the defendants' favor. That is, if the Corps had any doubts regarding an object in the photograph, it presumed that the object was a pier. Working on this presumption, the Corps counted 36 piers on the west side of the marina and 11 piers on

the east side of the marina which were authorized under the "grandfather" provision. According to the United States, defendants must remove all other unpermitted piers in their marina.

The United States contends that summary judgment in its favor is appropriate because there is no genuine dispute over the number of piers in Ericson Marine in 1985. The government bases this argument on its belief that the July 1985 photograph is conclusive proof of the number piers that existed at the marina in 1985. Moreover, the United States asserts that the court can dispel any doubt that may arise from the poor quality of the photograph since the Corps resolved all doubts regarding the existence of the pier in the defendants favor. In addition, the government also notes that the Corps' count of the number of piers that existed in 1985 is supported by the testimony of Stephen Treadwell.

In stark contrast to the government's count of 47 piers at Ericson Marine in 1985, defendants contend that there were approximately 82 piers at the marina in 1985. To support this position, defendants have provided affidavits from four different individuals who testify that 60 or more piers existed on the west side of the marina. Specifically, defendant Ericson testified that there was approximately 60 piers on the west side of the marina in 1985, and 22 piers on the east side of the marina when he purchased that facility in 1990. Defendant Ericson's testimony is supported by affidavits from Robert Wibert, Robert Bibbiano, and Al Delfino, all of whom estimate that there were 60 or more piers on the west side of the marina.

In short, the parties have presented conflicting evidence over the number of piers at Ericson Marine in 1985. This conflicting evidence creates a genuine issue of material fact over how many piers at Ericson Marine may remain under the Corps' "grandfather" policy. To determine how many piers existed at Ericson Marine in 1985, this court would not only have to evaluate the credibility and memory of various witnesses, but also make a decision from a photograph that is admittedly poor in quality. Decisions of this type are matters which may only be resolved by a jury after a trial. Thus, because there is a material dispute over the number of piers that existed at defendants' marina in 1985, the court denies the United States' motion for summary judgment.

II. Defendants' Motion for Summary Judgment

In their cross-motion for summary judgment, defendants argue that the Corps' adoption of 1985 as the measuring year for the permitting and "grandfather" policy should be invalidated by this court because the Corps failed to address the fundamental issue of whether high quality photographs of entire Fox River actually existed. Defendants also ask this court to rule that the 1985 date is arbitrary and capricious since the Corps did not provide any independent or coherent reason for selecting 1985. Defendants contend that the Corps wrongfully relied on some other entity's determination that 1985 was an appropriate year to select for a "grandfathering" policy. Defendants further argue that the Corps' determination regarding the number of piers that existed in 1985 is arbitrary and capricious because it is based on evidence that is "highly questionable." Finally, defendants ask the court to suspend this litigation until the Corps, in accordance with its own regulation, processes defendants' 1991 after-the-fact permit application.

A. Standard of Review Under the APA

Judicial review of the Corps' rules and decisions that defendants now contest is governed by Section 706(a)(2) of the Administrative Procedure Act ("APA"). 5 U.S.C. § 706(a)(2). The APA provides that "a reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions" which fail to meet statutory, procedural, or constitutional requirements, or are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Citizens to Preserve Oveton Park v. Volpe*, 401 U.S. 402, 413-14 (1971). Under this standard, the court's sole task is to determine "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* at 416; see also

Motor Vehicle Mfg. Ass'n v. State Farm Mutual Ins. Co., 463 U.S. 29, 43 (1983) (holding that an agency action should be set aside "if the agency relied on factors which Congress has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."). Moreover, the arbitrary and capricious standard of review "is a deferential one which presumes that agency actions are valid as long as the decision is supported by a 'rational basis'." *Pozzie v. United States Dep't. Of Hous. and Urban Dev.*, 48 F.3d 1026, 1029 (7th Cir.1995). As the parties seeking to invalidate the Corps' rules and decisions, defendants bear the burden of overcoming the presumption of validity. See *Sierra Club v. Marita*, 46 F.2d 606, 619 (7th Cir.1995).

Although there is a presumption of validity, this court must nevertheless engage in a "thorough, probing, in-depth review." *Citizens to Preserve Oveton Park*, 401 U.S. at 415. However, "the court is not empowered to substitute its judgment for that of the agency." *Id.* at 416. If this court finds that the Corps failed to provide a reasoned explanation for its action, or if the limitation in the administrative record make it impossible to conclude that the Corps' action was a product of reasoned decision making, the appropriate remedy is to remand the case to the agency for further proceedings or, in some cases, supplement the existing record. See *Motor Vehicle Mfg. Assoc.*, 463 U.S. at 34, 50-57. Finally, review of the agency's decision is limited to the evidence that the agency actually considered. *Id.* at 50.

B. Selection of 1985 as Measuring Year for "Grandfather" Policy

Defendants argue that this court should invalidate the Corps' decision to establish 1985 as the baseline year for the "grandfather" policy for two reasons. Defendants first contend that the Corps' decision was arbitrary and capricious because the Corps failed to determine whether photographs were available for the entire Fox River and whether these photographs were of high quality. Second, defendants assert that the Corps' decision was arbitrary and capricious because the Corps did not provide an independent reason for selecting 1985 as the baseline year, but, rather, relied on the State of Illinois' permitting policy.

The Corps' primary reason for selecting 1985 as the baseline year for the "grandfather" provision was so that the Corps and the state of Illinois would have consistent permitting policies. Defendants contend that the Corps' failure to independently research the facts that support Illinois' conclusion regarding the 1985 baseline year is an independent reason to hold the Corps' adoption of 1985 as arbitrary and capricious. See *Dardar v. LaFourche Realty Co., Inc.*, 639 F.Supp. 1525, 1531 (E.D.La.1986). However, this court finds that defendants' reliance on *Dardar* misplaced. In *Dardar*, the Corps issued permits to private parties to build access gates to "private" canals. *Id.* This decision was based, in part, on an opinion of the State Attorney General regarding whether the public had a right to use "private" canals. *Id.* The *Dardar* court held that the Corps, in that instance, was required to make a factual inquiry into the source of water for the "private canals."

The United States correctly points out that the *Dardar* court applied a de novo standard of review because the court found that the Corps' decision was adjudicatory in nature and that its fact-finding procedures were inadequate. *Id.* Here, the Corps' choice of a 1985 "grandfather" date was non-adjudicatory because it did not render a decision over a dispute involving specific individual rights. Thus, the Corps was not under an obligation to investigate why Illinois chose 1985 as the baseline for its permitting policy, nor did it have to make a factual inquiry regarding the adjudication of any particular rights. Rather, the Corps' articulated reason merely had to be rational.

Since both the Corps and Illinois have concurrent jurisdiction over the Fox River, this court finds that a rational goal of both entities would be to ensure that certain policy decisions are identical.

See *Ohio Assoc of Independent Schools v. Goff*, 92 F.3d 419, 424 (6th Cir.1996) (holding that a reasonable basis existed for utilizing a testing requirement to ensure that students from both public and private schools meet certain basic standards); *Natural Resources Defense Council, Inc. v. EPA*, 842 F.2d 1258 (1st Cir.1987) (holding that Nuclear Regulatory Commissions' proposed additions to policies which incorporated requirements from an Environmental Protection Agency regulation constituted a reasonable method of settling intra-agency jurisdictional dispute); *United States v. Moretti, Inc.*, 478 F.2d 418, 423 (5th Cir.1973) ("The watchword of the Corps relation with other federal agencies charged with protection of the environment is cooperation."). Clearly, having similar policies between state and federal regulators reduces the public's burden in obtaining pier permits, and also make the decision-making process for the Corps and Illinois less burdensome. It cannot be said, under the rational basis test, that choosing to create a policy that is consistent with the state's regulations is a "clear error of judgment." Thus, defendants' motion to vacate the EIS policy is denied because defendants have failed to meet their burden under the APA.

C. Corps' Decision Regarding Number of Piers at Ericson Marina

Defendants next argue that the Corps' determination that 47 piers existed at Ericson Marine in 1985 should be vacated as arbitrary and capricious because (1) the Corps relied solely on the July, 1985 aerial photograph in issuing its Notice of Violation and that photograph is inadequate to determine the number of piers at Ericson Marine; and (2) the Corps failed to conduct any further investigation as to the true number of piers. Defendants contend that since high quality photographs exist for the years 1988, 1991 and 1992, the Corps should be ordered to utilize those photographs for purposes of determining the number of piers to which Ericson Marine is entitled under the "grandfather" policy. The government argues that the Corps' decision is not arbitrary and capricious because, contrary to defendants' assertion, the Corps did consider evidence in making its determination as to the number of piers that existed in 1985. The government contends that the fact that the evidence the Corps considered was poor in quality only goes to the accuracy of its decision.

As mentioned, judicial review of this decision is governed by the APA because the Corps' determination and issuance of a notice of violation falls within the plain meaning of the statute. See 5 U.S.C. § 551(13) (reviewable agency actions include "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"). Thus, this court's sole task is to determine "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." See *Citizens to Preserve Oveton Park*, 401 U.S. at 416. In making this determination, this court will presume that the agency's action is valid, provided that the decision is supported by a rational basis. See *Pozzie*, 48 F.3d at 1029. Finally, this court is limited to the evidence that the Corps actually considered in making its determination regarding the number of piers that existed. See *Motor Vehicle Mfg. Ass'n*, 463 U.S. at 50.

Applying the APA's deferential standard of review, the court finds that the Corps' conclusion that defendants' marina had only 47 piers in 1985 passes scrutiny. The Corps researched its decision regarding the number of piers that existed by using the July 1985 photograph. While its research was based on evidence that was less than perfect, the Corps compensated for this deficiency by construing any doubts regarding the existence of the pier in the defendants' favor. Additionally, although the Corps asked for their input, defendants did not participate in the administrative proceedings. Moreover, the Corps asked Ericson to provide information as to the number of piers present in 1985 on three separate occasions, but Ericson did not do so. Finally, the Corps' decision to use a photograph from 1985 is rational considering that the measuring year for the "grandfather" policy was 1985. Clearly, using photographs from another year and making a decision based on those photos would be inconsistent with the policy established by the Corps. Based on these facts, the court finds that the Corps' decision that 47 piers existed in 1985 was

not arbitrary and capricious. Accordingly, the court denies defendants' motion to vacate this decision.

D. Defendants' After-the-Fact Permit Application

As an alternative to invalidating the Corps' decisions and regulations, defendants contend that the Corps has failed to follow its own regulations by refusing to process Ericson Marine's 1991 after-the-fact permit application. As a result, because the Corps has not made a decision with respect to Ericson Marine's pending application, defendants contend that the court should not make a decision regarding the case since the Corps has violated the APA through its failure to act. The United States responds that the Corps' failure to process the application is not a violation of the APA since defendants' application does not comply with the "no net gain" policy that was established during the suspension of the defendants' application.

As the court has pointed out, Section 10 of the RHA requires a permit for all obstructions in navigable waterways. However, individuals also have a right to seek an after-the-fact permit. See *United States v. Moretti*, 478 F.2d 418, 431 (5th Cir.1973). While this does not mean that an applicant has an unqualified right to receive a permit, an applicant is entitled to have that application processed fairly and diligently. *Id.* The applicant must also be provided a reasonable opportunity to present supporting data, facts, and arguments as to why the requested permit should issue. See *id.* Thus, according to its regulations, the Corps is required to render decisions on permit applications within 60 days of receipt.

However, the Corps was also required to suspend defendants' application when it undertook the EIS. A regulation promulgated under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, forbids an agency from taking any action that would "limit the choice of reasonable alternatives" while a decision for which an environmental impact statement is required is under consideration. See *Cronin v. United States Dep't of Agric.*, 919 F.2d 439, 449 (7th Cir.1990). Thus, because the EIS process was begun shortly after Ericson Marine submitted its after-the-fact permit application, the Corps' processing of the application had to give way to the NEPA process. See *Baker v. United States Dep't Of Agric.*, 928 F.Supp. 1513, 1520-21 (D.Idaho 1996) (where Forest Service regulation required agency to act upon plaintiff's proposed mining plan of operation within 90 days and that provision conflicted with NEPA, NEPA overrode regulation's timing requirement, even though plaintiff's plan was submitted months before environmental study began).

The issue before this court is whether the Corps had to process an application that was inconsistent with the new requirements of the EIS. Defendants contend that *United States v. Moretti* requires the court to suspend this litigation and have the Corps process their 1991 after-the-fact application. In *Moretti*, the Corps consulted the Secretary of the Interior when it made permitting decisions that could potentially have adverse affects on fish and wildlife. *Moretti*, 478 F.2d at 424. Upon receiving *Moretti's* application, the Corps stated that it had no objection to granting *Moretti* a permit. *Id.* at 426. However, the Secretary of the Interior objected to the granting of the permit and requested that the Corps refuse to issue the permit. *Id.* At that point, the permit granting procedure seemed to halt and the Corps left *Moretti's* application "in a sort of limbo" since several agencies wanted time to prepare more objections to the permit. *Id.* at 427. In the interim, *Moretti* disregarded the permit requirements and began to work on his project. *Id.*

The government then pressed criminal charges against *Moretti*, and the district court ordered that *Moretti* remediate the substantial dredging and filling that he had begun. *Id.* On appeal, the Fifth Circuit vacated the injunction that the district court ordered because the Corps failed to process *Moretti's* after-the-fact application. *Id.* at 431. Specifically, the court reasoned that "[defendant] had a right to file the application and have it processed in accordance with those regulations. Conversely, the Corps of Engineers as the delegated agent of the Secretary of the Army had the duty to process [defendant's] application." *Id.* at 425.

Moretti is factually distinguishable from this case because this case does not involve an authorized suspension of all permit applications or a situation where the permitting requirements have substantially changed. As a result, this court must again determine "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." See *Citizens to Preserve Oveton Park*, 401 U.S. at 416. In making this determination, this court will presume that the agency's action is valid, provided that the decision is supported by a rational basis. See *Pozzie*, 48 F.3d at 1029.

Upon completion of the EIS, the Corps advised defendants that they were in violation of the RHA and the Corps' permit policy. As a result, the Corps ordered Ericson Marine to either remove all unpermitted piers in excess of those shown on 1985 aerial photographs or to apply for an after-the-fact permit application in the manner required by the EIS ROD. (Emphasis added). Since defendants' 1991 permit application did not require an individual seeking an after-the-fact permit to remove an authorized pier of same size and holding capacity, the Corps' decision not to process defendants' 1991 application was rational since that application would necessarily not comply with the new permitting requirements. While it is interesting that the Corps did not take the step of denying the application for failure to comply with the new EIS ROD, it does not follow that this court should halt this litigation and remand the matter back to the Corps when the defendants have failed to show that there has been a clear error of judgment by the Corps. Thus, in this rare instance, it was rational for the Corps not to expend resources processing an application that was premised on previously overturned permitting policies. For this reason, this court denies defendants motion summary judgment on this matter.

CONCLUSION

For the reasons set forth above, the court (1) denies the United States motion for summary judgment [doc. 20-1] and (2) denies defendants' motion for summary judgment [doc. 27-1]. The court also denies the United States' motion to strike [doc. 36-1] and denies defendants' motion to strike the government's Rule 12(m) additional facts [doc. 40-1]. The court denies both parties' motions to strike because the contested evidence was admissible or did not alter the court's analysis in resolving the parties' motions for summary judgment. The parties should discuss settlement of this case before the next court date.