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Friends of the Earth v. U.S. Envtl. Prot. Agency, 446 F.3d 140 (D.C. Cir. 2006)

Diane O'Neil

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met its obligation under the ESA and sufficiently consulted with the FWS. Similar to the NEPA claim, the court found that the Andrade Mesa Wetlands were located outside of the United States and therefore did not require further action. In addition, the court found that a new critical habit legal fact did not exist, Reclamation did not act arbitrarily or capriciously, and therefore Reclamation was not required to reinitiate consulting. Accordingly, the court granted United States' motion for summary judgment.

Because CDEM could not show entitlement to the declaratory and injunctive relief requested for the alleged NEPA and ESA violations, the court granted summary judgment to Reclamation on both counts.

Jeffrey Conklin

Friends of the Earth v. U.S. Envtl. Prot. Agency, 446 F.3d 140 (D.C. Cir. 2006) (holding that Congress was unambiguous when creating the total maximum daily load provision of the Clean Water Act, and therefore the EPA must issue only *daily* maximum loads).

Friends of the Earth brought suit against the United States Environmental Protection Agency ("EPA") alleging that the Clean Water Act ("CWA") required daily loads under the Total Maximum Daily Load ("TMDL") provision rather than the seasonal or annual loads established by the EPA for the Anacostia River. The United States District Court for the District of Columbia ruled in favor of the EPA on summary judgment, stating that Congress did not indicate a clear intent to require only daily loads, and therefore, EPA's approval of the TMDL was not arbitrary and capricious. Friends of the Earth appealed. The United States Court of Appeals for the District of Columbia Circuit reversed the district court's decision, finding that the CWA clearly requires a TMDL to designate a *daily* load.

On appeal, the court conducted a *Chevron* analysis of the agency's interpretation of "total maximum daily load," finding that Congress spoke directly to the issue. Therefore, the EPA was foreclosed from any differing interpretations. The court looked to the CWA's language, citing the use of the term "daily" in the statute as indicative of Congress's intent was to require *daily* maximum loads when establishing TMDLs for "pollutants which the Administrator identifies as suitable for such calculations." The court held the term "daily" in "total maximum *daily* load" requires a daily maximum load for all TMDLs.

Furthermore, the EPA had the discretion to determine which pollutants were suitable for a TMDL. The EPA argued that daily loads for various pollutants were impractical due to the nature of the pollutant, and the pollutants at issue were perfect examples of such pollutants. However, according to previous EPA regulations, the EPA concluded that *all* pollutants were "suitable for such calculations." Therefore, the court found that the EPA must establish daily loads for the pollutants

at issue because they were "suitable" for a TMDL according to the previous EPA determination.

The court suggested the EPA may amend its current regulation to better classify the suitability of daily loads for the pollutants, which would allow the EPA to avoid establishing TMDLs for certain pollutants where daily loads are inappropriate. Additionally, the court suggested that Congress may adopt new legislation expanding the current statute to include a broad maximum load timeframe. However, the court cannot interpret daily to mean anything other than its plain meaning because it must follow the unambiguous terms of the CWA. Therefore, daily means daily for all pollutants currently identified by the EPA as suitable for a TMDL.

Finally, the court addressed the special circumstances surrounding combined sewer systems in regards to water quality standards. The court recognized Congress's more flexible approach in the legislation involving water quality standards for these systems, but again held, despite Congress's conflicting approaches, the court must follow express terms of the TMDL statute within the CWA.

Ultimately, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's decision and remanded with orders "to vacate the non-daily 'daily' loads."

Diane O'Neil

STATE COURTS

CALIFORNIA

Barnes v. Hussa, 39 Cal. Rptr. 3d 659 (Cal. Ct. App. 2006) (holding water users may change the place where they use the water so long as the change does not adversely affect the rights of other water users).

In May 2000, Rodney and Jan Barnes ("Barneses") brought suit in the Superior Court of Modoc County requesting an injunction against John and Linda Hussa ("Hussas"), and sought an order that the Barneses had an irrevocable right to the use of a pipeline. The Hussas, believing the Barneses abused their water rights by extending a pipeline, began to dig up the pipeline that traverses Barnses' property. The trial court issued a preliminary injunction in June 2000 preventing the Hussas from interfering with the Barneses' pipeline. In September 2000, the Hussas filed a cross-complaint for contempt and declaratory and injunctive relief. The trial court found that the Barneses had an irrevocable license to use the pipeline, that the extension of the pipeline did not substantially harm the Hussas, and that there was no evidence to support the Hussas' claim of forfeiture. The Hussas filed an appeal in the California Court of Appeals contending the trial court erred in holding that the Barneses did not injure them, that the Barneses did