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No Spray Coal., Inc. v. City of New York, No. 005395, 2005 US Dist. LEXIS 11097 (S.D.N.Y. June 8, 2005)

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No Spray Coal., Inc. v. City of New York, No. 005395, 2005 US Dist. LEXIS 11097
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and DEP that the MWRA would not be obligated to provide stormwater control for any other CSO control projects.

The United States argued that it was inappropriate for the MWRA to condition the incorporation of construction milestones for the North Dorchester Bay and Reserved Channel projects into Schedule Six upon reaching an agreement with the EPA and DEP. However, the United States maintained that it did not consider the MWRA's assumption of responsibility for stormwater control in North Dorchester Bay to be precedent for other CSO projects that remained to be completed. The EPA provided the MWRA with a letter stating the MWRA would not be liable for stormwater control on other project components.

The United States District Court for the District of Massachusetts found the concerns of the Board had been alleviated because no party had contested the MWRA's position that the MWRA was not liable for stormwater control in other CSO projects, and because the EPA provided the Board with written assurance that the stormwater control related only to the North Dorchester Bay and Reserved Channel projects. The Court ordered the MWRA to submit proposed milestones for incorporation into Schedule Six with its next Quarterly Progress Report.

Kevin Kennedy

No Spray Coal., Inc. v. City of New York, No. 005395, 2005 US Dist. LEXIS 11097 (S.D.N.Y. June 8, 2005) (denying motions for summary judgment because issues of material fact existed in determining whether the City of New York discharged a pollutant from a point source into navigable waters without a permit).

No Spray Coalition, Inc. ("Coalition"), a collection of non-profit organizations and individuals, filed a lawsuit in the Southern District of New York against New York City ("City") to enjoin the City from conducting its spraying program, which defends against the spread of West Nile Virus by killing mosquitoes and larvae that carry West Nile Virus. Coalition alleged that the City violated the Clean Water Act ("CWA") by discharging pollutants into the waters in and around the City without a permit. The district court denied Coalition's request for a preliminary injunction, but did not rule on the claims under the CWA. Following discovery, Coalition moved for summary judgment, and the City cross-moved for summary judgment. The district court granted the City's motion for summary judgment, holding that the CWA did not allow Coalition to bring a citizen suit. The Second Circuit vacated the judgment and remanded the case, ruling that the CWA authorizes citizens to file lawsuits to enforce its requirements. Both parties sought to renew their summary judgment motions. The district court denied

both motions because there were issues of material fact as to whether the City discharged pollutants into navigable waters without a permit.

On remand, Coalition and the City disputed whether the City's conduct constituted a violation of the CWA. Coalition argued that the City's actions were subject to the CWA, and since the City failed to obtain a permit to spray over water, the City violated the CWA. The City argued that the spraying program did not discharge pollutants, so a permit was not required. The second issue was whether Coalition offered sufficient evidence to find as a matter of law that the City violated the CWA. The City disputed most of the offered evidence.

The main goal of the CWA is to eliminate the discharge of all pollutants into navigable waters by restoring and maintaining the chemical, physical, and biological integrity of America's waters. The CWA defines "discharge of a pollutant" to include any addition of any pollutant to navigable waters from any point source. The National Pollution Discharge Elimination System ("NPDES") regulates the issuance of permits that allow the holder to discharge pollutants at levels below the thresholds incorporated in the permit. When sprayed into navigable waters, pesticides may constitute "an addition" under the CWA. The amount of pollutants discharged does not affect whether an addition took place.

Courts have loosely interpreted the definition of "point source" as any discrete conveyance that discharges or may discharge pollutants. The City's helicopters and trucks served to convey pollutants from their original source to the navigable water.

The definition of "pollutant" was the primary controversy in this case. According to the legislative history, courts should interpret "pollutant" broadly. The court noted that although the CWA includes chemical waste in the definition of "pollutant," it failed to define the meaning of chemical waste. The Environmental Protection Agency's position is that pesticides are not chemical waste because pesticides target organisms and remain useful when they are in the environment. Unlike chemical waste discarded in the air, the pesticides had the intended purpose of reaching and killing mosquitoes. Pesticides sprayed by the City could become chemical waste if they were no longer useful and the City discarded them.

Because the court faced disputed issues of material fact, the court denied both parties' motions for summary judgment. The issues of material fact need to be resolved by the trial court.

Tomi L. Hanson

In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., Master File No. 1:00-1898, MDL 1358 (SAS), M21-88, 2005 U.S. Dist. LEXIS 10781 (S.D.N.Y., May 31, 2005) (holding a claim for damages under the relevant California statute did not apply to groundwater contamination).