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permit for 700 acre-feet of water from the existing well to a new well that Day planned to drill. The Authority approved Day's request to drill a new well on December 10, 1999. However, on November 8, 2000, the Authority's general manager recommended that the Authority grant Day zero feet of water because Day failed to prove that the water satisfied a "purpose authorized by law." Day objected to this recommendation, and the Authority referred Day's objection to the State Office of Administrative Hearings where an administrative law judge ("ALJ") recommended the Authority grant Day a permit for fourteen acre-feet of water. Day appealed this decision to the Authority's board of directors ("Board"). On March 11, 2003, the Board adopted the ALJ's recommendation and issued Day a permit for fourteen acre-feet of water. Day filed suit in United States District Court for the Western District of Texas. The Authority filed a motion to dismiss the case from federal court because Day's case involved questions of state law and issues of vital state concern.

The Authority based its motion to dismiss on *Sierra Club v. City of San Antonio*, in which the Fifth Circuit Court of Appeals applied the Burford abstention doctrine in cases involving the Authority. The court noted the Burford abstention doctrine turned on whether the plaintiff's claim involved an issue of state law that a state court needed to rule on before the federal case could proceed. The court found the state of Texas retained great interest in the regulation of the Edwards Aquifer, and because the Aquifer contained a finite amount of water, the state should maintain the regulatory scheme. Furthermore, the state maintained a comprehensive administrative and appellate procedure for considering questions regarding the Edwards Aquifer and held greater interest and familiarity with the Aquifer than did the federal government. Therefore, the court granted the Authority's motion to dismiss the case based on the Burford abstention doctrine.

In sum, the court granted the Authority's motion to dismiss because the Edwards Aquifer, a completely intrastate source of water, contained a limited amount of water, because the water and its regulation were of vital importance to Texas, and because Texas already maintained a comprehensive regulatory system to manage the aquifer.

Brett Johnson

Friends of the Earth v. United States Env'tl. Prot. Agency, 346 F. Supp. 2d 182 (D.D.C. 2004) (holding the Clean Water Act was ambiguous as to whether the United States Environmental Protection Agency must calculate total maximum daily loads on a daily basis and upholding the United States Environmental Protection Agency's adoption of non-daily TMDLs as reasonable statutory construction and reasonably determined to achieve daily water quality standards).

Friends of the Earth ("Friends"), an environmental group, sued the United States Environmental Protection Agency ("EPA") in United States District Court for the District of Columbia claiming the EPA's approval of total maximum daily loads ("TMDLs") for the District of Columbia violated the Clean Water Act ("CWA"). Both parties moved for summary judgment. Section 303(d) of the CWA requires states to promulgate water quality standards and supplement those standards with TMDLs if effluent controls are not achieving the water quality standards ("WQs"). TMDLs are maximum pollutant concentrations in a water body, for a given time, calculated at a level necessary to implement the WQs, with seasonal variation and a margin of safety. The District of Columbia created a yearly TMDL for biological oxygen demand ("BOD"), and the EPA approved this standard. The EPA created and approved a seasonal TMDL for total suspended solids. Friends claimed the EPA acted in an arbitrary and capricious manner for two reasons: the CWA required daily TMDLs, and both the BOD and total suspended solids TMDL were insufficient to achieve the WQs.

The court first examined whether the EPA acted arbitrarily in setting a seasonal and annual TMDL, reviewing the agency decision under the standards set forth in *Chevron U.S.A. v. Natural Resource Defense Council, Inc.* First, the court asked whether Congress had directly addressed the issue. If the intent of Congress was clear, then the agency and the court must give effect to that intent. Second, if the statute was silent or ambiguous then the court must determine if the agency based its answer upon a permissible construction of the statute.

To determine if the statute was ambiguous, the court applied traditional tools of statutory interpretation, including language, intent, structure, and purpose. The court did not read the term "daily" in TMDL in isolation, but rather in statutory context. The court looked to the intent of Congress in creating the CWA and TMDLs, and compared portions of section 402 requiring the EPA to base municipal storm sewer permits upon best management practices with the TMDL requirement in section 303(d). If section 303(d) required daily TMDL standards, it would alter the flexible choices and maximum extent practicable controls of section 402. The court determined the conflict between these two sections revealed an ambiguity in congressional intent on TMDLs. The court also decided that section 402 was not an exception to 303(d) TMDL requirements, as argued by Friends.

The structure and purpose of the CWA also suggested to the court that Congress did not intend a rigid application of the word daily. The EPA used TMDLs as tools, not formal controls, to achieve WQs in non-attainment waterbodies. The court noted Congress divided mandatory technology controls from WQs and TMDLs within the CWA. TMDLs exist to supplement insufficient technology based controls, and it would be at odds with the statute to require the EPA to use daily

TMDLs even if non-daily TMDLs more effectively achieved WQSs. In addition, the court determined Congress did not intend for the EPA to impose daily TMDLs when they generated no benefit, by looking to various other sections of the CWA. The statute permits the EPA to issue permit modifications if there is a reasonable relationship between the costs and the benefits. The EPA may modify effluent limitations based on TMDLs where the water quality exceeds the WQSs.

The court also concluded non-daily TMDLs were consistent with the congressional policy to delegate power to the EPA to set these standards where appropriate. Deviation from daily standards occurred only when there was a polluted waterbody that non-daily standards would more effectively regulate. There was no agency usurpation in this case, since the EPA was not substituting its judgment for that of Congress. The regulated area required knowledge of the industry and the definition of daily-required agency expertise. The court held the word "daily" was ambiguous after considering the language, intent, structure, and purpose of the CWA. Congress did not clearly intend to require the EPA to calculate only daily TMDLs.

Since Congress was ambiguous in creating TMDLs, the court next determined whether the EPA's use of a seasonal and annual TMDL was reasonable in light of the record and purpose of the statute. For the BOD TMDL, the court decided the EPA's use of a yearly term was reasonable because the agency explained its decision, and no evidence existed of a superior term. The court also determined the seasonal total suspended solids TMDL was reasonable since the EPA explained its decision, and the court reasoned seasonal reductions effectively regulated total suspended solids.

The second issue for the court was whether the EPA calculated the TMDLs at a level reasonably stringent enough to achieve the District of Columbia's daily WQSs. The court noted it must uphold a TMDL if it falls within a zone of reasonableness.

The court concluded the EPA reasonably calculated the yearly BOD standard to achieve the District of Columbia's daily WQSs because of the scientific uncertainty involved and the EPA's use of reliable computer modeling. The court would not require the EPA to explain how the TMDLs would achieve the daily WQSs, only why the EPA believed they would achieve the WQSs. Although the court believed one of the EPA's possible regulation scenarios was a better choice, the court still upheld the EPA's decision because it was reasonable. The court also upheld the EPA's approach for determining the margin of safety because determining the proper approach for margin of safety was a policy choice left specifically to the agency's judgment.

The court also upheld the seasonal TMDL for total suspended solids against a challenge of failure to achieve daily WQSs. The EPA chose to calculate the total suspended solids TMDL to achieve wildlife protection and not recreational and aesthetic uses. The court permit-

ted the EPA to use wildlife protection as a surrogate standard for achieving recreational and aesthetic uses of the river because Congress did not state a specific process for TMDL calculation. The EPA reasonably assumed their level of reduction would meet all standards. In addition, the WQSs for the District of Columbia were subjective, requiring only that the waters be free from "objectionable odor, color, taste, or turbidity." The court would not accept objective facts to contradict the EPA's assertion because there was no frame of reference to compare the evidence. The EPA also indicated their willingness to revise the standard set for total suspended solids if there was a future showing the seasonal average violated the subjective criteria.

The court finally addressed the EPA's assignment of wasteload allocation, or the allocation of the receiving water's capacity to existing or future sources of pollution. The EPA assigned waste loads by a single permit to a treatment plant and a single permit to the District of Columbia's municipal separate storm sewer system. The court found this allocation was a reasonable interpretation because allocation into categories of sources did not deviate from the CWA or regulations.

For the reasons articulated above, the court granted summary judgment for the EPA.

Heather Heinlein

Grand Lake Estates Homeowners Ass'n v. Veneman, 340 F. Supp. 2d 1162 (D. Colo. 2004) (holding the United States Forest Service could require special use permits that affected the use of private land adjacent to the boundaries of a national forest, but the Forest Service did not have the authority to impound private property to compel holders of special use permits to comply with the terms contained therein).

Grand Lake Estates Homeowners Association ("GLEHA") filed suit in United States District Court for the District of Colorado against the Secretary of Agriculture asserting claims for declaratory judgment and injunctive relief against the United States Forest Service ("Forest Service"), relating to GLEHA's use of facilities on Shadow Mountain Reservoir. GLEHA owned a marina and docks built in the early 1960s on a small body of water located within the Grand Lake Estates subdivision, where a small man-made channel provided boat access from the marina to Shadow Mountain Reservoir. In 1978 Congress created the Arapahoe National Recreation Area ("ANRA"), which encompassed Shadow Mountain Reservoir, and delegated management of the ANRA to the Forest Service.

In 1985 the Forest Service notified GLEHA that it required a special use permit for GLEHA's marina. Thereafter, GLEHA applied for, and the Forest Service approved, special use permits for GLEHA's marina and boat docks. Pursuant to the special use permits, the Forest Service assessed GLEHA an annual fee, which GLEHA refused to pay