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## Kan. Natural Res. Council, Inc., v. Whitman, 255 F. Supp. 2d 1208 (D. Kan. 2003)

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proceedings.

In a related case, *South Florida Management District v. Miccosukee Tribe of Indians*, the United States Supreme Court had granted certiorari to decide the same issue of whether the conveyance of water by SFWMD from one body of water to another body of water, where the transfer of water would not otherwise occur, through a pump that does not itself add pollutants to the receiving water, constituted an "addition" of a pollutant from a point source under the Act, thus requiring an NPDES permit.

Because district courts are justified in granting a "stay pending the resolution of a related case in another court" the court granted the stay of proceedings pending the United States Supreme Court's decision in *Miccosukee Tribe*

*Regan Rozier*

**Kan. Natural Res. Council, Inc., v. Whitman, 255 F. Supp. 2d 1208 (D. Kan. 2003)** (granting summary judgment and holding the Environmental Protection Agency must meet statutory deadlines under the Clean Water Act for promulgating proposed regulations).

Kansas Natural Resources Council, Inc. ("KNRC") filed suit in the United States District Court for the District of Kansas in an action to compel the United States Environmental Protection Agency ("EPA") to promulgate regulations proposed to correct the State of Kansas' deficient water quality standards in a timely manner as mandated by the Clean Water Act ("CWA"). Both parties moved for summary judgment.

On February 19, 1998, the EPA determined certain water quality standards filed by the State of Kansas failed to comply with the CWA-mandated plan for the reduction and eventual elimination of water pollution. On August 10, 1999, Kansas submitted revisions in an attempt to comply with the CWA. Shortly thereafter KNRC filed this action. While the suit was pending, the EPA approved some of the revised quality standards submitted by the State. One group of deficient quality standards remained, regarding 1456 water bodies. Due to a May 19, 2000, consent decree, the EPA published proposed water quality standard regulations on July 3, 2000, correcting Kansas' remaining deficient standards. The EPA failed to promulgate the regulations by October 1, 2000, as required by section 1313(c)(4) of the CWA, mandating promulgation within ninety days after proposal. The EPA contended the July 2000 proposal generated a high level of interest resulting in an increased number of public hearings regarding the proposal and that an extended public comment period, past the ninety-day requirement, was necessary to ensure all interested parties received sufficient opportunity to comment. The EPA further argued the information received by these public hearings demonstrated a need to perform use attainability analyses on all 1456 bodies of water, a

process with proposed deadlines of July 14, 2006.

KNRC sought an immediate promulgation of the July 2000 standards by the EPA due to the failure to follow the CWA's original ninety-day requirement. The EPA responded that the court had discretion to allow the proposed schedule of attainability analysis to continue. The court, in examining the CWA, determined the EPA had a duty to follow the ninety-day guideline, unless the state corrected the quality problem prior to the EPA's promulgation of its standards. Due to this exception, the court ruled that all corrections by the State of Kansas after July 2000 overrode the previous EPA standards for proposed promulgation.

The court then examined its jurisdiction over cases involving a suit against the EPA for failure to perform its duty. The court concluded the plain language of relevant statutes allowed only the jurisdiction "to order the EPA to perform such act or duty" and no further discretion.

The court next examined whether the purpose of the CWA, "to provide water quality that is fishable/swimmable," was attainable with respect to the remaining 1456 water bodies. The EPA argued the public comments in response to the July 2000 proposal showed that the designation of fishable/swimmable was not attainable for all of the bodies of water. The court disagreed, stating the EPA previously established procedures to implement the CWA. The court further stated the EPA overlooked the rebuttable presumption that all bodies of water are to be placed under the fishable/swimmable designation unless the State could demonstrate such a designation was unattainable. The court held the State of Kansas could seek to remove particular bodies of water from the fishable/swimmable designation.

The EPA argued that the present case was analogous to *Weinberger v. Romero-Barcelo*, where the plaintiffs sought to enjoin the United States Navy's operations of discharging ordinance into water surrounding Puerto Rico. The discharges would be permissible if the Navy obtained a permit. The court in that case determined the district court was not required to immediately enjoin all actions violating the permit requirements. The court additionally emphasized that injunctive relief should be used "sparingly and with discretion." KNRC argued that the present case was more analogous to *Forest Guardians v. Babbitt*, where the United States Department of the Interior missed a deadline for designating a critical habitat under the Endangered Species Act and claimed it lacked the funds to make the designation. The court in that case rejected the argument and maintained the statutory deadline imposed a mandatory duty upon the Department of the Interior. The court here found that *Forest* was more applicable to the present case than *Weinberger* because in *Forest*, as in the present case, the agency failed to comply with a specific statutory deadline established by Congress.

The EPA offered several equitable arguments, which the court refused to address due to its limited ability to weigh equitable factors. The court additionally declined to address KNRC's request for attorney fees under relevant statute because neither party briefed the

issue.

Therefore, the court ordered the EPA to take final action and comply with the CWA's ninety-day requirement commencing at the date of the court order.

*Gerritt James Koser*

**Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 254 F. Supp. 2d 1196 (D. Or. 2003)** (holding agency issuing a biological opinion in accordance with the Endangered Species Act must consider all areas that directly or indirectly affect the endangered species due to the proposed action and not just the immediate action area).

The dispute in this case arose over whether a biological opinion issued by the National Marine Fisheries Service, a sub-agency of the National Oceanic and Atmospheric Administration ("NOAA"), properly considered all of the effects that the Federal Columbia River Power System ("FCRPS") would have on endangered and threatened salmon and steelhead in the Columbia River basin. The United States District Court for the District of Oregon held that NOAA's report was arbitrary and capricious.

FCRPS consists of fourteen dams located in the Snake River basin and the upper and lower Columbia River basin. On December 21, 2000, following consultation in accordance with section 7 of the Endangered Species Act ("ESA"), NOAA issued a biological opinion ("2000BiOp") that addressed effects FCRPS's future actions would have on endangered salmon and steelhead in the Columbia River basin. NOAA's opinion concluded that FCRPS's proposed actions would indeed jeopardize several endangered and threatened species of salmon and steelhead; however, NOAA proposed another action FCRPS could pursue that would not further jeopardize the endangered fish. The 2000BiOp included short and long-term federal actions to modify hydro-power operations to improve the survival of salmon passing through the dams, as well as short and long-term federal actions that would decrease FCRPS's impact on habitat, hatchery, and harvest of the endangered fish. NOAA also developed its 2000BiOp considering the effects of FCRPS's operations in coordination with other ongoing Federal and regional processes. The action area in NOAA's 2000BiOp included only the immediate area where FCRPS's actions would directly affect the endangered salmon; NOAA's action area did not include areas where FCRPS's actions would indirectly affect the endangered salmon. NOAA further concluded that if the recommendations failed to limit the negative impact on the fish, referring back to consultation under section 7 would be necessary. National Wildlife Federation ("NWF") along with several environmental and conservation organizations filed suit against NOAA, arguing that NOAA's "no-jeopardy" conclusion was arbitrary and capricious.