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Friends of Yosemite Valley v. Norton, 348 F.3d 789 (9th Cir. 2003)

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the burden of proof to businesses to demonstrate they did not decrease water quality in contravention of the statute's requirement that the EPA establish a program controlling sources. The court held the waiver system was reasonable to allow exceptions for small sites that would likely not damage water quality.

NAHB also claimed that the EPA improperly retained power to designate sources of stormwater runoff in the future. NAHB argued that Congress did not authorize the EPA to retain such power. NAHB also claimed that such authority violated the non-delegation doctrine because the EPA developed no "intelligible principle" to guide its future discretion, and because the ability to designate in the future was not disclosed for notice and comment. The court held the EPA's authority to designate sources covered under the rule did not expire, and that the issue of whether the EPA could designate a source without determining its eligibility was not yet ripe for review. On the non-delegation challenge the court held the overall purpose of the CWA—protecting water quality—gave the EPA sufficient guidance. Finally, the court held the power to designate future sources was a logical outgrowth of continuing designation present in the draft rule, and therefore provided sufficient opportunity for notice and comment.

NAHB raised a challenge under the Regulatory Flexibility Act ("RFA"), arguing the EPA failed to conduct sufficient analysis and ignored the substantial cost imposed on small entities by the Phase II rule. The court found the EPA reasonably determined the rule would insignificantly impact small entities, and even if the EPA improperly complied with the RFA, its assessment of the economic impact made the error harmless.

Justice Tallman concurred in part and dissented in part. He believed the court should defer to the EPA, allow certain determinations without review, and approve NOI's without comment.

Jared Ellis

Friends of Yosemite Valley v. Norton, 348 F.3d 789 (9th Cir. 2003) (holding National Park Service's (1) Merced Comprehensive Management Plan violated Wild and Scenic Rivers Act because it did not adopt specific limits on visitor use and improperly delineated certain segment boundaries, (2) decision to prepare Merced Comprehensive Management Plan as a programmatic document did not violate Wild and Scenic Rivers Act nor National Environmental Policy Act, and (3) failure to prevent sewage spills was actionable under Wild and Scenic Rivers Act but did not violate that Act's agency cooperation mandate).

This appeal arose from Friends of Yosemite Valley's ("Friends") challenge to the National Park Service's ("NPS") Merced Wild and

Scenic River Comprehensive Management Plan ("CMP"). In the United States District Court for the Eastern District of California, Friends alleged the NPS failed to prepare a valid CMP that would adequately protect and enhance natural values on segments of the Merced River flowing through Yosemite National Park and its administrative site, El Portal, thereby violating the Wild and Scenic Rivers Act ("WSRA") and the National Environmental Policy Act ("NEPA"). Specifically, Friends claimed the CMP violated WSRA by inadequately addressing user capacities, delineating river segment boundaries in disregard of WSRA's mandate, and by failing to cooperate with federal and state agencies to reduce pollution on the Merced. Friends also alleged the NPS's preparation of the CMP as a programmatic document violated NEPA and WSRA. After the district court rejected each of these claims, Friends appealed to the United States Court of Appeals for the Ninth Circuit.

On appeal, the Ninth Circuit first held the CMP inadequately addressed user capacities. WSRA requires administering agencies to prepare CMPs to address resource protection, user capacities, and other management practices necessary to achieve conservation goals. Based on the plain meaning of the statute and agency interpretative guidelines, the court concluded that WSRA requires CMPs to contain specific, measurable limits on use and discuss the maximum number of people that designated river segments can accommodate. Here, the CMP addressed user capacities by relying primarily on an NPS-promulgated management element, Visitor Experience and Resource Protection ("VERP"). The VERP framework provided a process for determining desired conditions, selecting monitoring standards that reflected those conditions, and undertaking management action when those conditions were not met. The VERP framework, however, only employed sample standards and indicators—it did not actually measure user capacities. Given the CMP's failure to provide a concrete measure of use, the court remanded the CMP to the NPS with instructions to adopt specific limits on user capacity and describe an actual level of visitor use on the Merced.

The Ninth Circuit also held the NPS violated WSRA by defining the El Portal segment boundaries too narrowly. WSRA requires that CMPs delineate boundaries that "include an average of not more than 320 acres per mile measured from the ordinary high water mark on both sides of the river." However, in setting boundaries, an administering agency must comply with WSRA's mandate to protect and enhance "outstandingly remarkable values" ("ORVs"). Here, the CMP recognized geologic, recreational, biologic, cultural, and hydrologic ORVs. But the CMP boundaries for four miles of the El Portal segment, although within the statutory range, included only the greater of the River Protection Overlay (the statutorily established minimum buffer zone) or the 100-year floodplain. The court ruled that these boundaries insufficiently protected the El Portal segment ORVs because the NPS had yet to fully locate many ORVs within this segment. In particular, the boundaries did not sufficiently protect

cultural ORVs because many river-related archeological sites lay outside the 100-year floodplain. Accordingly, the court remanded the CMP in order for the NPS to draw boundaries in compliance with the WSRA's ORV protection mandate.

Next, the court rejected Friends claim that, because the NPS prepared the CMP as a programmatic document, it did not contain sufficiently specific data to satisfy WSRA and NEPA requirements. WSRA only instructs administering agencies to prepare "comprehensive" management plans. Due to the lack of specificity in WSRA language, the court concluded the Merced CMP, based on nearly 100 years of study and the best available information at the time, met the ordinary meaning of "comprehensive," thereby satisfying statutory requirements. The court also held the programmatic CMP did not violate NEPA requirements mandating full environmental evaluation of site-specific impacts of agency action. Although the programmatic CMP provided only broad guidelines to govern future management decisions, because it contemplated full, site-specific review of future agency action, the court held it contained sufficient data to satisfy NEPA.

The court then turned its attention to Friends' allegation that the NPS failed to cooperate with federal and state agencies in preventing pollution on the Merced. WSRA directs administering agencies to cooperate with the United States Environmental Protection Agency and state water pollution control agencies to reduce pollution on designated rivers. After a number of sewage spills into the Merced from NPS facilities, including several that occurred after it received an abatement order from the California Regional Water Quality Control Board ("Board"), Friends charged the NPS with failure to comply with WSRA cooperation mandates. The NPS challenged this claim on the grounds that the Clean Water Act's ("CWA") authorization of citizen suits provided the exclusive remedy for point source pollution violations. According to the NPS, Friends' failure to comply with CWA notice provisions barred assertion of the claim. However, the court rejected this argument, relying on both the plain language of the CWA, which expressly permits parties to seek relief under other statutes, and precedent recognizing similar WSRA claims. Further, in the court's view, to disallow Friends' claim under WSRA would ignore an important distinction between the two statutes. The CWA authorizes suits to enforce effluent standards and its notice provisions are intended to prevent litigation by allowing violators time to *remedy* pollution. WSRA, on the other hand, requires agency cooperation to *prevent* water pollution. Thus, permitting Friends' WSRA suit would not thwart the purpose behind CWA notice provisions.

However, addressing the merits of Friends' claim, the Ninth Circuit affirmed the district court's finding that the NPS did not fail to cooperate with the Board. The district court found that following pollution discharges the NPS complied with reporting requirements and promptly remedied equipment failures. Hence, although the NPS failed to prevent discharges, based on the record, the district court did

not clearly err in rejecting Friends' claim. Therefore, the Ninth Circuit affirmed the district court's ruling in part, reversed in part and remanded the case for further proceedings.

Arthur R. Kleven

Orff v. United States, 358 F.3d 1137 (9th Cir. 2004) (holding that farmers were not third-party beneficiaries to a contract between a water district and the federal government, where the water district received water from a water management project, and the farmers thus could not utilize a statutory waiver of sovereign immunity allowing suit for intended third-party beneficiaries or other parties to a contract).

The Westlands Water District ("Westlands") brought suit in California against the United States in the United States District Court for the Eastern District of California challenging a reduction in its allocation of Central Valley Project ("CVP") water as violating a 1963 contract. Landowners and water users (collectively "Farmers") and the Natural Resources Defense Council ("NRDC") intervened in the suit. In 1995, Westlands dismissed its complaint. The Farmers remained in the suit and filed an amended complaint. In 1998, the district court dismissed most of the Farmers' claims. The district court initially decided that the Farmers acted as a contracting entity and the government waived sovereign immunity. It then determined that it had jurisdiction to hear the remaining claims. It threw out three of the Farmers' claims and determined that the fourth claim raised a triable issue of fact. In 2000, pursuant to a motion for reconsideration, the district court altered its position on the sovereign immunity issue. It entered a judgment in favor of the federal government in 2000. The Farmers appealed to the United States Court of Appeals for the Ninth Circuit. NRDC and Westlands filed briefs as interveners in the appeal.

The CVP subsists as the nation's largest federal water management project. Westlands receives water from the CVP pursuant a 1963 contract with the United States. A previous case in 1986 ("*Barcellos I*") upheld the enforceability of the 1963 contract. In the early 1990s, the government listed the Sacramento River winter-run chinook salmon and delta smelt of the Sacramento-San Joaquin Delta as threatened species under the Endangered Species Act ("ESA"). The National Marine Fisheries Service found that the operation of the CVP jeopardized these species. The Bureau of Reclamation ("Bureau") reduced Westlands contractual supply of water by fifty percent. The Bureau acted under authority of the ESA and the Central Valley Project Improvement Act. The Farmers brought suit claiming that the reduction violated the 1963 contract.

The court first addressed the sovereign immunity issue. It asserted that it strictly interprets the extent of a waiver of sovereign immunity in favor of the government. Farmers argued that issue and claim preclusion barred the government's sovereign immunity defense.