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California Trout, Inc. v. Fed. Energy Regulatory Comm'n, 313 F.3d 1131 (9th Cir. 2002)

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construction sites within the purview of the Phase II Rule. They argued that the EPA's use of Census-Bureau data to designate small MS4s lacked a sound basis. The Industry Parties asserted that the EPA failed to establish a correlation between population size and stormwater pollution. The court treated the EPA's designation with great deference. The court denied the Industry Parties' assertion that the EPA must establish the correlation with pinpoint precision. For areas of technical expertise, courts do not require perfect data or studies. The Industry Parties also argued that the EPA's designation of small construction sites between one and five acres as falling under the Phase II Rule lacked sufficient support in the record. Again, the court gave great deference to the EPA on this claim. Under an arbitrary and capricious standard, the court would have reversed only if the EPA relied on factors Congress did not intend for them to consider. The court looked to the record, which contained more than twenty studies of stormwater pollution impacts from small construction sites, and found EPA's designation of small construction sites under the Phase II Rule plausible. Thus, the EPA acted according to the record when designating small construction sites under the Phase II Rule.

Adriano Martinez

California Trout, Inc. v. Fed. Energy Regulatory Comm'n, 313 F.3d 1131 (9th Cir. 2002) (holding state water quality certification required by the Clean Water Act does not limit federal authority to permit ongoing projects pending relicensing).

California Trout, Inc. ("Trout") petitioned for review of a Federal Energy Regulatory Commission ("FERC") order that denied its request for rehearing and revocation of the annual license for Project 1933, operated by Southern California Edison ("Edison"). At issue was whether FERC acted within its authority when it issued annual licenses to Edison pursuant to the Federal Power Act ("FPA"), though Edison had not received state water quality certification as required by the Clean Water Act ("CWA"). FERC denied this request for rehearing and Trout appealed to the United States Court of Appeals for the Ninth Circuit pursuant to 16 U.S.C. § 8251(b). The court affirmed FERC's denial.

This dispute arose from the 1996 expiration of Edison's fifty-year FPA license for Project 1933 permitting the diversion of water from the lower portion of the Santa Ana River for both water supply and power generation. Edison filed an application for a new license for the project in 1994 and simultaneously requested water quality certification pursuant to the CWA. The state denied water quality certification, but Edison received a temporary suspension through March 2002. After that date Edison filed a new application for water quality certification.

In May 1996, FERC issued an annual license to Edison for the continued operation of Project 1933. FERC would renew this annual license automatically every year until it issued a new long-term license. Trout sought to vacate this annual license until Edison received state water quality certification. Trout argued that the conflicting provisions of the FPA and the CWA could only be “harmonized” by issuing annual licenses when the state either granted or waived water quality certification.

FERC held, and the court confirmed, that the issuance of an annual license is an administrative or nondiscretionary act, requiring FERC to authorize continued project operation under the terms and conditions of the original license. Therefore, annual licensing is not a licensing action that triggers the requirements of CWA. Furthermore, the court looked at congressional intent of the CWA and stated that Congress did not intend to restrict FERC’s authority to prevent the closure of a licensed project pending relicensing. Instead, the FPA and the CWA function together because no new project license or license amendment can issue without compliance with the state water quality certification requirement of the CWA.

Erika Delaney Lew

League of Wilderness Defenders v. Forsgren, 309 F.3d 1181 (9th Cir. 2002) (holding pesticides sprayed from a plane constitute a point source pollutant necessitating a National Pollution Discharge Elimination System permit, and requiring an analysis of pesticide drift to supplement the Environmental Impact Statement).

The League of Wilderness Defenders and other environmental groups (“League”) brought suit in the United States District Court for the District of Oregon seeking an injunction preventing the United States Forest Service (“USFS”) from continuing to spray insecticide to kill the Douglas Fir Tussock Moth (“moth”). The League claimed that the USFS required a National Pollution Discharge Elimination System (“NPDES”) permit and revised Environmental Impact Statement (“EIS”) for further spraying. The district court granted summary judgment to the USFS on both issues. The League appealed to the United States Court of Appeals for the Ninth Circuit. The court reversed and remanded the case to the district court, enjoining the USFS from further spraying until it obtained an NPDES permit and revised its EIS to consider the impact of pesticide drift.

The USFS initiated pesticide sprays in response to early warning system predictions that a moth outbreak in 2002-2003 would result in substantial defoliation. However, drift of the aerial pesticide used possesses many potentially dangerous side effects including the possibility of harming beneficial species, insect food supplies for fish, and possible harm to birds and plants.