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## Natural Res. Def. Council, Inc. v. Fox, 93 F. Supp. 2d 531 (S.D.N.Y. 2000)

John A. Helfrich

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argued EPA failed to consider the possible effects on the human environment, failed to properly assess all alternatives, and improperly segmented the impacts of the Facility therefore failing to consider the cumulative impacts. EPA moved for summary judgment.

The court noted the standard of review was whether EPA took a “hard look” at the environmental consequences of the Facility. The court needed to determine whether EPA had convincingly documented its determination of “no significant impact” so that its decision was not made arbitrarily or capriciously. After careful review of the record, the court determined EPA had considered all the environmental impacts adequately, and that the record was not so incomplete to support a FONSI. The court granted EPA’s motion for summary judgment.

The court concluded EPA considered the effects on the human population, the environment, and considered possible alternatives to the Facility. Thus, EPA had met its requirement to take a “hard look” at all the potential environmental impacts of the Facility. In addition, the court noted the lack of evidence presented by ASLF to show how EPA decisions were made in an arbitrary or capricious manner. Finally, the court agreed with EPA that, although the Facility was one of many projects implemented to improve water quality, the Facility had independent utility because the facility alone improved water quality. ASLF objected, arguing that since the Facility would not meet the CWA requirements alone, it was dependent on any other project implemented for that purpose. The court rejected this notion, stating that the Facility will improve water quality by its own operation. ASLF did not dispute this fact. The fact that other projects must be implemented to meet the CWA water quality standards did not diminish the independent utility of the Facility. Therefore, the scope of EPA review did need not to extend to the cumulative effect of the entire abatement project.

*Patrick Nackley*

**Natural Res. Def. Council, Inc. v. Fox, 93 F. Supp. 2d 531 (S.D.N.Y. 2000)** (holding (1) the Environmental Protection Agency (“EPA”) did not unreasonably delay a declaration of “constructive submission” of deficient New York State (“State”) total maximum daily loads (“TMDLs”); (2) EPA had no present duty to promulgate State TMDLs; (3) EPA did not breach its mandatory duty to manage the TMDL program in compliance with the Clean Water Act; (4) TMDLs submitted by the State and approved by EPA met substantive requirements; and (5) EPA’s decision to classify ten TMDLs as “informational” breached a nondiscretionary duty to either approve or disapprove all TMDLs submitted by the State for approval).

This case involved the alleged failure of New York State (“State”) to

establish total maximum daily loads (“TMDLs”) for prioritized waterbodies in the State that failed to meet water quality standards compiled in the State’s Section 303(d) list, and Environmental Protection Agency’s unlawful failure to intervene. In 1995, the Natural Resources Defense Council (“NRDC”) filed suit in the District Court for the Southern District of New York against the Environmental Protection Agency and two of its administrators (collectively, “EPA”) pursuant to the Clean Water Act (“CWA”). The case evolved into a suit for judicial review of EPA’s alleged inaction under the Administrative Procedure Act (“APA”).

NRDC alleged EPA was required to treat the State’s slow progress in promulgating TMDLs as a “constructive submission” of deficient TMDLs. “Constructive submission” triggers a mandatory duty on EPA to disapprove the “submission” and establish TMDLs for the State. The court rejected NRDC’s “constructive submission” argument as a cause of action under the CWA. The CWA does not impose any time requirements on EPA to take such actions. The court determined the doctrine exists solely as “judicial gloss” on the CWA. In light of EPA’s general neglect of the TMDL program and recent progress by EPA and the State in establishing TMDLs, the court found EPA’s decision not to declare a “constructive submission” was not arbitrary, capricious, or contrary to law.

In conjunction with its “constructive submission” claim, NRDC argued EPA “unreasonably delayed” and “unlawfully withheld” agency action. The court found agency action “unlawfully withheld” only when a clear statutory deadline exists. Because the CWA does not impose a deadline for declaring a “constructive submission,” the “unlawfully withheld” argument failed. The court analyzed the “unreasonably delayed” argument using six factors described in *Telecommunications Research and Action Center v. FCC*. Based on these factors, even assuming EPA’s duty to declare a “constructive submission,” the court found no unreasonable delay.

The court dismissed NRDC’s claim that EPA was required to promulgate their own TMDLs for the State because it was contingent on finding that EPA was required to declare a “constructive submission.” Although the court found the record insufficient to support NRDC’s claim, it did not want EPA and the State to needlessly delay implementation of the TMDL program. Thus, the court dismissed this claim without prejudice.

NRDC next alleged that eight EPA-approved New York City reservoir TMDLs failed to meet substantive CWA requirements. The court reviewed the TMDLs to determine whether they implemented applicable water quality standards, contained a margin of safety, comprised wasteload allocation and load allocation components, established daily pollution limits, and accounted for seasonal variations. The court found the TMDLs met these requirements and the administrative record rationally supported EPA’s approval.

Therefore, EPA's approval was not arbitrary, capricious, or otherwise not in accordance with law. The court dismissed the claim with prejudice.

NRDC's next claim involved ten reservoir TMDLs submitted for review and approval from the State's Section 303(d) list. EPA accepted the TMDLs for "informational purposes" only on the basis that the reservoirs did not exceed critical loads. EPA asserted that because the reservoirs were not water quality limited, they need not appear on the Section 303(d) list. NRDC alleged EPA's duty to act on a TMDL depended solely on whether the State's Section 303(d) list included the water body. Thus, NRDC argued EPA had breached a mandatory duty under the CWA to either approve or disapprove the TMDLs. The court agreed with NRDC and found the CWA unambiguously requires agency action on any proposed TMDL submitted for review and approval from a state's Section 303(d) list. The court ordered EPA to either approve or disapprove these ten proposed TMDLs within thirty days of the entry of judgment.

Finally, NRDC alleged EPA breached its mandatory duty under the CWA to "oversee and effectuate" New York's Section 303(d) program. The court dismissed for failure to state a claim. The court stated NRDC must specifically address EPA's failures item by item rather than simply alleging generally that EPA has poorly administered the TMDL program.

*John A. Helfrich*

**No Spray Coalition, Inc., v. City of New York, No. 00 Civ. 5395, 2000 U.S. Dist. LEXIS 13919 (S.D.N.Y. Sept. 25, 2000)** (holding the spraying of insecticides in accordance with registered use does not give rise to a personal action under the Clean Water Act, the Federal Insecticide, Fungicide, and Rodenticide Act, the Resource Conservation and Recovery Act, nor violates the requirements of the State Environmental Quality Review).

No Spray Coalition ("Coalition") sought to enjoin the City of New York ("City") from spraying insecticides designed to eradicate mosquitoes carrying the West Nile Virus. The Coalition asserted the City's spraying program was ineffective and dangerous to the community. The court determined that deciding whether the benefits of the insecticide outweighed the harm caused to the community was outside its role. The court dismissed all claims that the spraying program violated federal law. However, the court refused to dismiss the claim that the City sprayed the insecticide directly over navigable waters to allow the Coalition to engage in further discovery. The court also denied the Coalition's application for preliminary injunction.

The court first looked at whether the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") provided a private right to sue. The court concluded Congress was deliberate in not allowing a