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## Natural Res. Def. Council, Inc. v. Muszynski, 268 F.3d 91 (2d Cir. 2001)

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requires polluters to obtain a National Pollutant Discharge Elimination System ("NPDES") permit. Catskill claimed the City's transfer system constituted a violation of the CWA since the City had no NPDES permit to discharge water from the Reservoir via the Tunnel. The City countered first, by citing authority from other federal circuits, which, relying on EPA policy statements, stated that NPDES permit requirements did not apply to discharges from dams, and second, by arguing its discharges did not amount to "additions" of pollutants.

The Second Circuit admitted such statements could be persuasive and deserved qualified deference from the court. However, it found they in no way bound it to follow the holdings of other Circuits. Furthermore, the court distinguished the two cited cases because they involved the recirculation of water within a given system, whereas Catskill's claim involved an artificial "inter-basin transfer" of water made possible by a tunnel.

As to whether such a transfer could be considered an "addition" of pollutants, the court appealed to logic and policy. Though the CWA does not define "addition," the court held, "[n]o one can reasonably argue that the water in the Reservoir and the Esopus [Creek] are in any sense the same, such that the 'addition' of one to the other is a logical impossibility." Moreover, the court felt the CWA's "uncompromising policy of 'restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters,'" should guide its interpretation of the debated term. Therefore, since the water from the Reservoir might have been more polluted than the water in the Creek, and because that would upset the Creek's environmental integrity, the court held such a transfer could constitute an "addition." A different finding, the court opined, could lead to a potentially hazardous precedent allowing transfers from extremely polluted watersheds into clean ones. Accordingly, the court reversed the lower court's ruling.

*Daniel C. Wennogle*

**Natural Res. Def. Council, Inc. v. Muszynski, 268 F.3d 91 (2d Cir. 2001)** (holding that the Environmental Protection Agency did not violate the Administrative Procedure Act by approving the State of New York's total maximum daily load standards for phosphorus in eight drinking water supply reservoirs because: (1) the Clean Water Act did not require that all TMDLs be expressed in daily terms; (2) formulating the TMDLs based on an aesthetic water quality standard was sufficient for drinking water supply purposes; and (3) given the limited data and methodology available, EPA used its best professional judgment in determining the margin of safety for the TMDLs).

In recent years, nineteen reservoirs located in upstate New York, which supply New York City with its drinking water, have suffered

increased phosphorus pollution due to sewage and nonpoint source discharges. Phosphorus pollution can cause excessive growth of algae and aquatic macrophytes, which may harm the aesthetics of the reservoir and its drinking water supply.

In 1994, Natural Resources Defense Council, Inc. ("NRDC") filed suit in the United States District Court for the Southern District of New York claiming that the State of New York ("State") had a duty under the Clean Water Act ("CWA") to promulgate total maximum daily load ("TMDL") pollution standards for the reservoirs and that its failure to do so left the Environmental Protection Agency ("EPA") with a duty to promulgate such standards. The district court denied NRDC's summary judgment motion on this claim, holding that a genuine issue of fact existed as to whether the State had submitted TMDLs for the reservoirs.

In January 1995, the State placed the reservoirs on a list given to EPA for priority in developing TMDLs. In 1996, the State published a report of its methodology for developing phosphorus TMDLs for the reservoirs and explained that the TMDLs would be phased in over time. On January 31, 1997, the first set of TMDLs was submitted to EPA for eighteen of the nineteen reservoirs. On April 2, 1997, EPA approved TMDLs for eight of the reservoirs. EPA declined to approve TMDLs for the remaining ten reservoirs, concluding that pollution levels in those reservoirs did not exceed the level that required TMDLs under the CWA.

NRDC amended its complaint claiming the TMDLs the State submitted were inadequate under the CWA and EPA's approval of TMDLs for eight of the reservoirs violated its duty under the CWA as well as the Administrative Procedure Act ("APA"). EPA moved for summary judgment on both claims. The district court granted EPA's motion on the CWA claim, stating that EPA's approval of TMDLs under the CWA was within its discretion. However, the district court rejected EPA's motion on the APA claim stating that genuine issues of fact existed as to whether EPA should have approved some of the TMDLs. On May 2, 2000, the district court found that EPA's approval of the eight TMDLs was supported by the administrative record and therefore, did not violate the APA.

On July 28, 2000, NRDC appealed this ruling to the United States Court of Appeals for the Second Circuit. In its appeal, NRDC renewed its argument that the EPA violated the APA by approving TMDLs that were deficient because the standards: (1) were expressed in terms of annual, not daily, loads; (2) failed to implement the applicable water standard for the situation—water supply; and (3) failed to incorporate an adequate margin of safety.

The court stated that although a strict reading of the CWA suggested that TMDLs had to be expressed in daily terms, permitting alternative periods of measurement would best serve the purpose of effectively regulating the broad range of pollutants covered under the CWA. However, the court noted that the record showed that seasonal changes in temperature, density, and wind affected phosphorus

concentrations. As such, the court suggested that a seasonal measurement would be more appropriate for establishing phosphorus TMDLs for the reservoirs. Therefore, the court remanded this issue to require EPA to justify how its annual period of measurement would account for these seasonal variations.

Second, the court expressed concern with EPA's use of a less stringent aesthetic water quality standard, instead of the more stringent water supply standard, for formulating its phosphorus TMDLs. It noted, however, that the current aesthetic water quality standard was driven by the need to control excessive algal and aquatic plant growth, the same problems phosphorus creates for drinking water supplies. Moreover, the scientific knowledge regarding phosphorus pollution in the reservoirs was not complete. As such, the record adequately supported the court's holding that EPA's use of an aesthetic water quality standard was appropriate for formulating the reservoirs' phosphorus TMDLs.

Third, the court found that if EPA were disregarding a widely used and reliable scientific methodology in determining a margin of safety for its phosphorus TMDLs, their action would be easily open to challenge. However, it noted that in determining the TMDL margin of safety for the reservoirs, EPA used a model applied to several New York City reservoirs in the past. Moreover, information available on the reservoirs was limited. As such, the appellate court felt that EPA had used its best professional judgment in formulating the margin of safety for the TMDLs.

*Matthew J. Costinett*

#### FOURTH CIRCUIT

**Piney Run Pres. Ass'n v. Cty. Comm'rs, 268 F.3d 255 (4th Cir. 2001)**  
(holding National Pollutant Discharge Elimination System ("NPDES") permit holder was shielded from Clean Water Act ("CWA") liability for discharges of pollutants not listed in the permit, provided such discharges were disclosed to the permitting authority and reasonably contemplated in the permitting process).

Piney Run Preservation Association ("Association") brought suit in United States District Court for the District of Maryland against Commissioners of Carroll County, Maryland ("County"), alleging a county-operated waste treatment plant discharged warm water into Piney Run Stream ("Piney Run") in violation of the CWA.

The NPDES permit issued to Carroll County did not expressly allow discharge of heated water. During the NPDES permitting process, however, Carroll County disclosed the fact that the plant would emit such water. The district court found the County liable under the CWA for discharges from the Plant exceeding state water