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Ky. Waterways Alliance v. Johnson, 426 F. Supp. 2d 612 (W.D. Ky. 2006)

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The Sierra Club's final argument questioned the Corps compliance with NEPA. Federal agencies are required to perform an EA to determine if a broader, more detailed Environmental Impact Statement ("EIS") is required. After the Corps' completed the EA, it issued a FONSI and therefore was not required to perform an EIS. For an agency to reach a FONSI, NEPA requires that agency to take a "hard look" at the evidence to satisfy the process. However, United States Supreme Court precedent indicates a court must be "highly deferential" regarding technical or scientific evidence. The Sierra Club questioned the agency's "hard look," their FONSI determination, and whether the Corps had completed the appropriate alternatives analysis. The court held the Corps had satisfied each claim.

The court looked at the 4500 pages of record and held that the Corps did not need NEPA to "remind it to take a hard look at the impacts of its actions." It already had. Regarding the FONSI determination, the Corps admitted to relying on mitigation measures. The court held mitigation measures must be "more than a possibility." They must "constitute an adequate buffer so as to render such impacts so minor as to not warrant an EIS." The court held that the science supported both the mitigation and the special conditions attached to the permit. Finally, regarding the Corps' search for alternatives, the court held the Corps had detailed a no action alternative and individual permitting alternative in its EA. The court held the Sierra Club's argument inadequate because it lacked a genuine discussion, only "summarily dismisses" the Corps' work, and had no suggestions of its own. Further, an EA requires a lower standard of alternatives discussion than an EIS.

In addition to holding in favor of the Corps on all of the Sierra Club's claims, the court also vacated the preliminary injunction. The court ended by holding the Corps' issuance of the permit, "is at, but not beyond, the outer limits of that authority."

Zackary Smith

Ky. Waterways Alliance v. Johnson, 426 F. Supp. 2d 612 (W.D. Ky. 2006) (holding that the EPA did not act arbitrarily or capriciously when it approved the procedures providing administrative and judicial review under Kentucky's permitting process and that Kentucky's antidegradation procedures meet the requirements of the CWA).

Kentucky Waterways Alliance ("Waterways") sought summary judgment against United States Environmental Protection Agency ("EPA"); Waterways asserted that the EPA acted arbitrarily and capriciously when it approved Kentucky's Tier II Antidegradation Rules and did not ensure the protection of existing "high quality" water as required by the Clean Water Act ("CWA"). States establish their own methods for identifying which waters in its boundaries require Tier II protection and the EPA may give final approval to the chosen method. When a

state permits new pollutants or discharges into Tier II waters, the state must determine that reducing the water quality is required to accommodate economic or social development. The entity discharging pollutants must receive a permit from a state agency to discharge into Tier II waters unless the release of the pollutant is *de minimis*. The issues before the United States District Court for the Western District of Kentucky were: (1) whether the EPA's approval of Kentucky's antidegradation procedure was consistent with the requirements of the CWA; and (2) whether the EPA acted arbitrarily and capriciously when it approved Kentucky's procedures.

The court addressed eleven matters concerning Kentucky Tier II antidegradation procedures to determine whether the EPA's decisions were arbitrary and capricious. First, the court addressed the EPA's determination that discharges with increased pollutant loadings of less than twenty percent would not significantly degrade water quality. Kentucky regulations did not require an antidegradation review for Kentucky Pollution Discharge Elimination System ("KPDES") permit renewals and modifications that caused less than a twenty percent increase in pollutant loading from the formerly allowable pollutant loading. The court held that a comprehensive review of the Kentucky permit program's history and its possible impact on receiving waters performed by the EPA demonstrated that the provision would have resulted in no more than a *de minimis* discharge and consequently would not require a Tier II review.

Waterways requested the court assess the EPA's determination that the default limits for domestic sewage discharges did not considerably degrade the water quality. Kentucky's antidegradation implementation procedures provided that permits for new or expanded domestic sewage discharges that had restrictions as strict as the limitations provided in the CWA Tier II regulations were not required to undergo a Tier II antidegradation review. The court held that, when the EPA looked at past statistics and measured water levels, it was justified in determining that the procedures set by the KPDES permitting system would achieve the CWA's objective without requiring a Tier II antidegradation review.

The court then examined the EPA's determination that discharges at a default level of one-half of otherwise permissible quality-based restrictions were not likely to cause significant water quality degradation. Kentucky regulations permitted new or expanding non-domestic dischargers to high quality water to accept KPDES permit restrictions that were no more than one-half of the water quality-based limitations that standard design conditions allowed for. The court held that the EPA's analysis of the historical KPDES permits, flow records, and conditions justified the conclusion that the fifty-percent provision would not have resulted in any reduction of the water quality or in a significant degradation of high quality waters. Additionally, discharges which met the

restrictions would likely not had greater than a *de minimis* impact on water quality because the fifty-percent provision would have imposed more stringent limits than currently in place.

The court assessed the EPA's determination that a publicly owned treatment works subject to a regional plan did not require Tier II antidegradation analysis. Kentucky's antidegradation policy stated that an approval of a publicly owned treatment works regional facility plan met the requirements for an antidegradation review. The court held the proposed plant approvals met the CWA's standards because they were equivalent to antidegradation review.

The court analyzed the EPA's determination that the process for the issuance of storm water general permits sufficiently dealt with antidegradation concerns. Kentucky's implementation procedures stated that discharges subject to KPDES storm water general permits were not subject to Tier II antidegradation review. The court agreed with the EPA that the public participation process was satisfied through a general permit issuance and the EPA's recognition of Kentucky's right to exercise discretion addressed the socioeconomic accommodations. Additionally, under the general permit any potential storm water discharges would have been a *de minimis* reduction of water quality and would not have required a Tier II review.

Waterways asked the court to examine the EPA's determination that, under Kentucky regulations, discharges associated with coal mining received a Tier II antidegradation review consistent with the requirements of the CWA. Under Kentucky antidegradation regulations, coal-mining discharges were subject to regulation under the Surface Mining Control and Reclamation Act, and were not subject to Tier II regulation. The court agreed with the EPA that the findings indicated that the existing programs under Surface Mining Control and Reclamation Act had a decision-making process with Tier II review and with the CWA.

The court considered the EPA's determination that Kentucky's recognized process for permitting domestic sewage from single-family residences was consistent with the CWA. Kentucky regulations stated that Tier II review was not compulsory for domestic sewage discharges from single-family dwellings. The EPA argued, and the court agreed, that the Kentucky permit process was consistent with the CWA because the established process fulfilled the requirements by allowing public involvement in addition to a socioeconomic accommodation study, and was consistent with the general purpose of the CWA to retain high quality water levels.

The court then assessed the EPA's determination that concentrated animal feeding operations ("CAFO") do not need antidegradation review. Kentucky regulations stated that CAFO discharges were not subject to Tier II review because permits regulated the CAFO facilities and allowed absolutely no discharges apart from those that may

have arose from considerable rainfall. The court held that non-point discharges were not subject to antidegradation review as they were not subject to federal regulation but were a matter for the states. In addition, the infrequency of precipitation in connection with the fact that the regulation prohibited all other discharges demonstrated that CAFO sources would have no more than a *de minimis* effect on water quality.

The court examined the EPA's approval of Kentucky's choice not to include impaired waters in its Tier II classification. The court held that case law recognized the use of a water body-specific approach, as over ninety percent of Kentucky waters received Tier II or III protection using this approach. The court also held that the EPA correctly examined the impact of a water body-specific approach and found it to be consistent with EPA requirements supporting water levels necessary to sustain fish, shellfish, and wildlife.

Waterways asked the court to assess the EPA's determination that the Kentucky regulations contained adequate implementation procedures. The court held that the EPA was correct in arguing that antidegradation regulations applied to discharges involving KPDES permit review and they provided permit applicant guidelines for the state to follow.

The court then considered the EPA's approval of Kentucky's KPDES permit implementation procedures, even though the procedures did not address CWA Section 401 water quality certifications. The EPA answered, and the court agreed, that this claim had no merit because a procedure to issue 401 certifications already existed in Kentucky.

The court held that the EPA did not act arbitrarily or capriciously when it approved the procedures providing administrative and judicial review under Kentucky's permitting process.

Kathleen Brady

UNITED STATES CLAIMS COURT

Stockton East Water Dist. v. United States, No. 04541L, 2007 WL 548819 (Fed. Cl. Feb. 20, 2007) (holding that (1) individual water users were not third-party beneficiaries of water allocation contracts between the Bureau of Reclamation and the irrigation districts; (2) the shortage provision in the contracts excused non-performance of water allocations; (3) conservative operation of the New Melones Dam was not unreasonable and did not breach the contract; (4) the alteration of the contractual obligations due to recent legislation was not a taking).

This case arose from a water allocation and distribution dispute in the Central Valley Basin ("Basin") of California regarding water from the New Melones Dam. The dam is part of a federal water conserva-