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Friends of the Earth v. EPA, 333 F.3d 184 (D.C. Cir. 2003)

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the electricity-generating effect from the operation of the Turtle-Flambeau reservoir. The court first deduced that the most significant impacts of the reservoir were on the four of the eight units that FERC used in its findings. FERC used these four plants because they are “physically and operationally interrelated” with the Turtle-Flambeau reservoir. Because the Clean Water Act does not define the “complete unit” of development for FERC’s finding, the court held that FERC’s deference was not unreasonable. Concluding that the FPA supported the required license for Chippewa’s non-electricity generating reservoir, the court denied Chippewa’s petition for review.

Becky Bye

Friends of the Earth v. EPA, 333 F.3d 184 (D.C. Cir. 2003) (holding Circuit Courts of Appeals lack original jurisdiction under the Clean Water Act to review total maximum daily load decisions by the Environmental Protection Agency).

The District of Columbia (“District”) developed water quality standards under the Clean Water Act (“CWA”) for the Anacostia River addressing both dissolved oxygen and turbidity. Because the Anacostia violated these water quality standards, the District developed Total Maximum Daily Loads (“TMDLs”) for the river pursuant to the CWA, which limited the maximum pollution input allowed into the water body. The Environmental Protection Agency (“EPA”) approved the District’s TMDL for dissolved oxygen in December 2001 and approved the TMDL for turbidity in March 2002. Following these decisions, Friends of the Earth (“FOE”) filed suit in the District of Columbia Circuit Court of Appeals, claiming the standards were insufficient to protect water quality. The EPA moved to dismiss the suit, arguing that the court of appeals lacked subject matter jurisdiction to review TMDLs because they are governed by section 1313 of the CWA.

Section 1369(b)(1) does not expressly authorize courts of appeal to review TMDL determinations under section 1313. As a result, the EPA argued that the court could not review the decision, while FOE argued that approval of TMDLs fell within section 1369(b)(1)(E) of the CWA.

The court of appeals ultimately held it lacked original jurisdiction to review EPA approvals of TMDLs, dismissed the petition for review, and transferred the case to the district court for consideration of whether the action could be reviewed under the Administrative Procedure Act. In reaching its holding, the court of appeals looked at the plain language of the statute and held that 1369(b)(1) of the CWA governed the limited original jurisdiction of federal courts of appeal reviewing EPA actions. The court noted the statute explicitly authorized a court of appeal to review the approval of effluent limitations under sections 1311, 1312, 1316 or 1345 of the CWA, but was silent regarding the ability of a court of appeals to review approval

of TMDLs falling under section 1313.

The court of appeals next focused on *Longview Fibre Co. v. Rasmussen*. In *Longview*, the Ninth Circuit held it could not review TMDLs because it lacked original jurisdiction. The *Longview* court considered whether it could review TMDLs under the language of section 1311, and determined that Congress' exclusion of section 1313 from the list of reviewable sections meant that Congress did not intend for courts of appeals to originally review TMDL decisions. The *Longview* court also found that Congress drew distinctions between the effluent limitations in section 1311 and section 1313 in other parts of the CWA, thus indicating TMDLs could not constitute effluent limitations under section 1311. Finally, the *Longview* court found the listing of section 1312 also supported its argument that Congress did not intend for appellate jurisdiction over reviews of TMDLs, because 1311 would subsume section 1312.

FOE encouraged the court to instead consider the Supreme Court decision in *Public Utility District No. 1 of Jefferson County v. Washington Department of Ecology*. FOE argued that the Supreme Court interpretation in *Public Utility District* incorporated section 1313 effluent limitations into section 1311, making TMDL determinations reviewable by a court of appeals. However, in this case, the court of appeals found the short reference in *Public Utility District* could not overcome both the plain language of the CWA and the Ninth Circuit opinion in *Longview*. The court argued FOE ignored the context of the incorporation statement. The Supreme Court originally based the incorporation statement on legislative history, but the court of appeals argued legislative history provided no explanation of incorporation in this context, and was therefore irrelevant. Because of the paucity of explanation in *Public Utility District*, the court found the plain language of the statute and the decision in *Longview* to mean it possessed no original jurisdiction to review the EPA's TMDL decision. Thus, the District of Columbia Circuit Court of Appeals dismissed the case.

Jared Ellis

COURT OF FEDERAL CLAIMS

Norman v. United States, 56 Fed. Cl. 255 (Fed. Cl. 2003) (holding (1) Court of Federal Claims lacked jurisdiction over an illegal exaction claim; and (2) Government's motion *in limine* improperly barred the Normans from challenging validity of the wetlands redelineation that effected a taking, insofar as it sought to prevent developer from directly challenging the validity or authorization of the government's actions).

Don Roger Norman and Roger William Norman (the "Normans") filed a complaint against the United States Army Corps of Engineers