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Treacy v. Newdunn Assocs., 344 F.3d 407 (4th Cir. 2003)

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had standing to sue, the Fourth Circuit noted that while other farmers may have discharged upstream, the upstream discharges did not negate the fact that the Hog Farmers' discharges might have harmed the Environmental Groups.

Finally, the Fourth Circuit addressed the issue of continued violations. A plaintiff seeking to sue under the citizen suit provision of the Clean Water Act must prove that the defendant's CWA violations were ongoing at the time of suit. The Fourth Circuit held that the district court erroneously decided the Environmental Groups had CWA jurisdiction and that the district court made its decision without the requisite factual development. Thus, the Fourth Circuit vacated the district court's decision and remanded the continued violations issue to the district court.

Adriano Martinez

Treacy v. Newdunn Assocs., 344 F.3d 407 (4th Cir. 2003) (holding that U.S. Army Corps of Engineers jurisdiction under the Clean Water Act applies to any branch of a tributary system which eventually flows into a navigable body of water).

The Army Corps of Engineers ("Corps"), pursuant to its authority under the Clean Water Act ("CWA"), brought a civil enforcement action in the United States District Court for the Eastern District of Virginia to prevent Newdunn Associates, Orion Associates, and Northwest Contractors (collectively "Newdunn") from ditching and draining wetlands on forty-three acres near Newport News, Virginia. The Virginia State Water Control Board ("Board") initiated a separate enforcement action in state court, premised on the Virginia Nontidal Wetlands Resources Act of 2000 ("Virginia Act"). Newdunn successfully removed the state action to federal court, which consolidated the two cases and denied the Board's motion to remand for lack of jurisdiction. The district court ruled for Newdunn in both cases, finding that the Corps lacked jurisdiction over wetlands on the Newdunn Property under the CWA, and that the jurisdictional reach of Virginia law was coextensive with federal law.

On appeal, the Fourth Circuit Court of Appeals first considered whether a federal question existed to provide a proper basis for removing the Board's case to federal court. Because the Newdunn property contained land that satisfied both the Virginia and federal definitions of "wetlands," the court held there was no tension between the two laws, and thus, there could be no federal question jurisdiction based on Virginia's decision to adopt the Corps' definition of "wetlands." Moreover, the Virginia Act gave jurisdiction over all of the state's waters to the Board, underscoring the lack of federal involvement.

Newdunn argued that the Board and Corps' jurisdiction was coextensive because Virginia code stated that certain state permits

satisfied certification under the CWA. However, the court observed that overlap between state and federal permitting procedures did not mean the state's jurisdictional reach turned on an interpretation of the CWA. So long as the state's permitting program was at least as stringent as the federal discharge elimination process, it could stand in place of the federal regulations. Finding that it lacked jurisdiction over the Board's action, the court reversed the ruling of the district court and remanded the Board's enforcement action to the Virginia state court.

Turning to the Corps' civil enforcement action premised on the CWA, the court held that the Corps' jurisdiction depended on whether the waters in question were "navigable," as contemplated by the United States Code. A holding that such waters met the "navigable" definition would provide jurisdiction to the Corps pursuant to section 404(a) of the CWA. The court determined that waters contained by Newdunn's ditching efforts were navigable under the CWA, because pollutants added to both the manmade and natural waterways on the Newdunn property would inevitably find their way to the waters Congress sought to protect. Thus, the Corps' jurisdiction was proper.

For these reasons, the court remanded the Board's state enforcement action to Virginia state court, and the Corps' enforcement action to federal district court for further proceedings not inconsistent with its opinion.

Curtis Graves

United States v. Deaton, 332 F.3d 698 (4th Cir. 2003) (holding (a) the U.S. Army Corps of Engineers' tributary regulation fit comfortably within Congress' authority to regulate navigable waters, (b) the Corps' regulation of a roadside ditch under the Clean Water Act did not exceed Congress' authority, and (3) the Corps' interpretation of its own regulation was reasonable).

In 1989, the Deatons purchased a twelve-acre parcel ("Deaton Parcel") on the Delmarva Peninsula, which separates the Chesapeake Bay from the Atlantic Ocean. To make the Deaton Parcel suitable for development into a small residential subdivision, the Deatons needed to drain a large wetlands area in the middle of the property. The Deatons hired a contractor in early 1990 who dug a drainage ditch through the property. In the process of digging, the contractor excavated dirt to either side of the drainage ditch in the wetlands area. The drainage ditch flowed into a roadside ditch, which emptied into the tributary system of the Chesapeake Bay.

In July 1990, the United States Army Corps of Engineers ("Corps") became aware of the Deatons' ditch and initiated regulatory action. After a series of unsuccessful negotiations, the United States filed a